(19,260.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 203.

PATRICK KIERNS, EXECUTOR AND TRUSTEE OF JOHN KIERNS, DECEASED, PLAINTIFF IN ERROR,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Remittitur from court of appeals	*a*	1
Case on appeal to court of appeals	*d*	2
Statement under rule 41	1	2
Summons	2	3
Complaint	3	3
Answer of the N. Y. & Harlem R. R. Co	9	6
Decision	24	15
Judgment, January 18, 1901	30	18
Exception to decision	33	19
Notice of appeal to appellate division	34	20
Affidavit of no opinion	35	20
Evidence for plaintiff	36	21
Exhibits offered, &c	36	21
Testimony of John Keirns	44	25
Kate Lambert	50	29
Charles L. Lambert	54	31
Frank G. Swartwout	57	34

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1905.

	Original.	Print
Plaintiff rests	64	37
Motion to dismiss	64	38
Motion denied	67	39
Evidence for defendants	67	39
Exhibits offered, &c	67	39
Exhibit 4 A—Deed, Benj. L. Benson to N. Y. & Harlem R. R. Co., January 18, 1832	68	40
Further offers of exhibits, &c	70	41
Testimony of George H. Thompson	74	43
Joseph H. Franklin	74	44
Lorenzo S. Palmer	76	45
Motion to dismiss denied	79	46
Plaintiff's Exhibit F—Copy of a part of a map entitled "A map of the city of New York," &c	80	46
F—Inscription on foregoing map	81	47
Q—Damage map	82	47
S—Plan under act of 1872	83	47
Defendants' Exhibit 2—Copy of part of profile map	84	47
2—Inscription on foregoing map	85	48
Exhibits 3 and 4—Agreement of January 9, 1832, &c	87	48
Exhibit 7—Inscription on following map	101	56
7—Plan and profile under act of 1872	102	56
12—Amended plan	103	56
14—Comparative profiles of structure	104	56
15—Map showing temporary trestle	105	56
Stipulations as to record	106	57
Order as to record	106	57
Order of affirmance in appellate division	107	57
Judgment of affirmance in appellate division	108	58
Memorandum of affirmance in appellate division	110	58
Notice of appeal to court of appeals	111	59
Stipulation as to record	113	60
Opinion of court of appeals	114	60
Order for judgment on remittitur	116	62
Judgment on remittitur	118	62
Assignment of errors	120	63
Petition for writ of error	126	66
Writ of error	131	69
Citation and service	133	70
Bond	134	71
Clerk's certificate	137	75

a STATE OF NEW YORK, *ss*:

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 24th day of February, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, Clerk.

Remittitur, February 25th, 1903.

JOHN KIERNS, Respondent,
ag'st
THE NEW YORK AND HARLEM RAILROAD COMPANY and Another, Defendant.

Be it remembered, that on the 25th day of September in the year of our Lord one thousand nine hundred and one The New York and Harlem Railroad Company and another the appellants in this action came here into the court of appeals, by Ira A. Place their attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the first judicial department. And John Kierns the respondent in said action afterwards appeared in said court of appeals by
b Atwater & Cruikshank his attorneys. Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

"That in said suit or action there was drawn in question the validity of chapter 339 of the Laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to section 1 of article 14 and the amendments thereto, and of section 10 of article 1 thereof, and thereupon the decision of this court of appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

Whereupon, the said court of appeals having heard this cause argued by Mr. Ira A. Place of counsel for the appellants, and by Mr. Alfred B. Cruikshank of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is reversed and complaint dismissed without costs.

And it was also further ordered, that the record aforesaid, and the

proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed and complaint dismissed without costs as aforesaid.

c And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals, remitted into the supreme court of the State of New York, before the justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, February 25th, 1903.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, Clerk.

d In the Court of Appeals.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Case on Appeal.

Atwater & Cruikshank, attorneys for plaintiff-respondent, 115 Broadway, borough of Manhattan, N. Y. city, N. Y.

Ira A. Place, attorney for defendants-appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

1 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Statement under Rule 41.

This action was commenced on the 23d day of September, 1897. The summons and complaint were served on the defendants on that

day. The answers of the defendants were served on the plaintiff on the 2d day of November, 1897.

The names of the original parties are as they appear in the above-entitled action in full. By an order entered herein on the 17th day of April, 1900, Ira A. Place, Esq., was substituted as attorney for the defendants in the place of Frank Loomis, Esq.; no other change in parties or attorneys has taken place pending the action,.

2 Supreme Court, City and County of New York.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Summons.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated September 14th, 1897.

ATWATER & CRUIKSHANK,
Plaintiff's Attorneys.

Office and post office address, No. 115 Broadway, New York city.

3 Supreme Court, City and County of New York.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Complaint.

The plaintiff complains of the defendants, and alleges, upon information and belief:

I. That at all the times hereinafter mentioned each of the defendants was, and now is, a domestic corporation created for the purpose of building, maintaining and operating a steam railway.

II. That the plaintiff now is, and has been since April 12th, 1882, seized in fee simple and in possession of a lot of land, with the building thereon, situated on the southeast corner of One hundred and fourteenth street and Fourth or Park avenue, in the city of New York, and bounded and described as follows, viz:

Beginning at the southeast corner of One hundred and fourteenth street and Fourth avenue; running thence easterly along the southerly side of One hundred and fourteenth street seventeen (17) feet, five (5) inches; thence southerly and parallel with Fourth avenue and
4 partly through a party wall one hundred (100) feet and eleven (11) inches to the centre line of the block; thence westerly along said centre line seventeen (17) feet and five (5) inches to the easterly line of Fourth avenue, and thence northerly along said easterly line of Fourth avenue one hundred (100) feet and eleven (11) inches to the point or place of beginning.

III. The said Park avenue, in the city of New York (formerly known as Fourth avenue), is, and has been, since prior to the year 1870, a public street in said city, and was, prior to the year 1870, opened and established as a public street of the city of New York, by proceedings taken under and in accordance with an act of the legislature of the State of New York, passed April 9th, 1813, being chap. 86 of the Laws of 1813, entitled "An act to reduce several laws relating particularly to the city of New York into one act," and the statutes amendatory of and supplemental to said act.

IV. By virtue of the proceedings so taken under said statutes above mentioned, the title to said Park avenue was acquired and has always been and is now held by the city of New York in trust, that the same be appropriated and kept open for or as part of a public street, avenue or place forever, and the plaintiff's predecessors in title to the premises above mentioned were, during the time of their respective seizin and possession thereof, and plaintiff since his seizin and possession of the same has been and now is seized and possessed of an easement appurtenant to said premises to have the said Park avenue kept open and used only as a public street or avenue in like manner as other public streets and avenues in the city of New York were when said avenue was laid out and opened and now are and of right ought to be used; and since said Park avenue was opened and established as a public street aforesaid, there have been
5 and now are attached to said premises above mentioned, and appurtenant thereto, easements of light, air and access in and over Park avenue for the benefit of said premises and of plaintiff.

V. That prior to April 1st, 1873, the defendant, The New York and Harlem Railroad Company, had constructed and was operating a steam railroad over the surface of Park avenue in front of said premises, and on or about April 1st, 1873, the said New York and Harlem Railroad Company leased to the defendant, The New York Central and Hudson River Railroad Company, its said railroad on said Park avenue, and all its rights therein, for the term of four hundred and one years.

VI. That subsequent to said lease the defendants, without right or authority, as against the plaintiff or his predecessors in title, excavated the said Park avenue in front of the premises above mentioned and constructed in the cut or depression formed by such excavation a railway with numerous tracks, for the operation of a

steam railroad, and the defendants, for more than six years past, have maintained upon that portion of Park avenue which is subject to plaintiff's easements as aforesaid said railway in said cut or depression, with walls of masonry extending above the surface of said portion of said avenue, and at the present time said railway is, and for more than six years past has been, operated by trains drawn by steam engines, and under the said lease said railway is and has been maintained and operated as aforesaid for the benefit of both defendants.

VII. That in or about April, 1893, defendants began constructing, and have since continued to construct, and have in part erected
6 and since maintained upon that portion of Park avenue, which is subject to plaintiff's easements as aforesaid, a permanent elevated railway structure of iron and steel, supported by columns of iron and steel, standing on pedestals of masonry embedded in the soil of said avenue. The said structure rises many feet above the surface of said avenue and substantially and materially interferes with and impairs the easements of light, air and access as aforesaid appurtenant to the premises of plaintiff.

VIII. The defendants threaten and intend to maintain said elevated railway structure and to add thereto and enlarge and strengthen the same, and upon completion thereof to operate thereon trains of cars, drawn by steam engines, and the defendants intend to permanently maintain and operate said structure for the uses and purposes of a steam railroad.

IX. That by reason of the said acts of the defendants the easements appurtenant to plaintiff's said premises have been trespassed upon and injured, and the said premises have been deprived of light, air and access and the privacy thereof invaded, and the stability of the buildings thereon impaired, and the damages already sustained by the plaintiff, in consequence thereof, amount to the sum of five thousand (5,000) dollars, besides which the fee value of plaintiff's premises has been greatly diminished thereby.

X. That said additions to and enlargement of said elevated railway structure and the running of trains thereon, as aforesaid, will, to a still greater extent, deprive said premises of light, air, access, privacy, stability, quiet and other rights, and the easements appurtenant to said premises as aforesaid will be still further appro-
7 priated by the defendants and still greater and additional damages will be inflicted upon said premises, and the injuries hereinbefore described will be greatly increased and intensified.

XI. That said acts of the defendants have been, are and will be without warrant of law, without consent of plaintiff and without compensation to him, and that the said acts and the injuries complained of are and will be constant and continuous trespasses upon plaintiff's property and rights aforesaid, and to prevent a multiplicity of suits and to afford plaintiff adequate relief, the equitable interference of this court is necessary.

Wherefore plaintiff demands judgment:

(1.) For the sum of five thousand (5,000) dollars, as and for damages for the trespasses committed by defendant-, as above stated.

(2.) For an injunction perpetually enjoining and restraining the defendants, and each of them, from further maintaining or operating the above-described elevated railroad in front of plaintiff's premises, and a judgment directing the removal thereof.

(3.) For such other and further relief as may be just, with the costs of this action.

ATWATER & CRUIKSHANK,
Plaintiff's Attorneys.

8 CITY AND COUNTY OF NEW YORK, *ss:*

John Keirns, being duly sworn, says: That he is the plaintiff herein; that he has read the foregoing complaint, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

(S'd) JOHN KEIRNS.

Sworn to before me this 18th day of September, 1897.

(S'd) ELLA DROHEN,
Notary Public, New York County.

9 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW York Central and Hudson River Railroad Company, Defendants.

The Separate Answer of the Defendant The New York and Harlem Railroad Company Herein.

First.

1. Admits the allegation of the complaint contained in the paragraph thereof numbered "I."

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint contained in the paragraph thereof numbered "II."

3. Admits that certain portions of Park avenue in the city of New York, formerly known as "Fourth avenue," are, and have been since and prior to the year 1870 a public street, in said city, and that such portions were prior to the year 1870 opened and established as a public street of the city of New York, by proceedings taken under
10 chapter 86 of the Laws of 1813, passed April 9, 1813, but denies that the whole of the strip of land known as Park

avenue is now, or ever has been, a public street; and denies that by the proceedings instituted in or about the year 1853, upon the application of the mayor, aldermen and commonalty of the city of New York, for the opening of said Fourth avenue from 38th street to the northerly line of 135th street, under and pursuant to said chapter 86 of the Laws of 1813, no absolute or exclusive title to the strip of land 24 feet in width, the centre line of which coincided with the centre line of said Fourth avenue, and which was then actually, and still is actually, used for the purposes of the railroad of the defendant, The New York and Harlem Railroad Company, was ever acquired by the said mayor, aldermen and commonalty of the city of New York, and alleges that in and by said proceedings the said mayor, aldermen and commonalty of the city of New York did not acquire and made no attempt to acquire the easement in the portions of the bed of Fourth avenue 58 feet in width, extending upon each side of the 24-foot strip aforesaid, previously acquired from the owners thereof by the defendant, The New York and Harlem Railroad Company, for the purposes of its railroad.

4. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "IV.," and alleges that whatever title the said mayor, aldermen and commonalty acquired in and to the strip of land in the city of New York, 140 feet in width, and then known as Fourth avenue (now Park avenue), was subject to all the rights of this defendant, The New York and Harlem Railroad Company, its successors and assigns to maintain and operate the railroad existing at the time said proceedings for opening
11 said Fourth avenue were consummated by final order, and was also subject to the maintenance and operation of any railroad of the defendant, The New York and Harlem Railroad Company, thereafter constructed in, under, upon or over any portion of said strip of land pursuant to the authority and direction of the legislature of the State of New York.

5. Admits that prior to April 1, 1873, this defendant, The New York and Harlem Railroad Company, had constructed and was operating a steam railroad over the surface of a strip of land in the city of New York, on each side of which was a public street now known as Park avenue, and that said railroad was constructed and operated in part in front of the premises described in the complaint, and admits and alleges that on or about April 1, 1873, this defendant, The New York and Harlem Railroad Company, leased to the defendant The New York Central and Hudson River Railroad Company its said railroad extending from Forty-second street, in the city of New York, through the said Park avenue to Chatham, together with all its rights therein, for the term of four hundred and one years; but for the full purport and effect of the said lease this defendant begs leave to refer to the said lease with the same force and effect as if the said lease, or a copy thereof, were hereto annexed and formed a part of this answer, and denies each and every other alle-

gation of the complaint contained in the paragraph thereof numbered "V."

6. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VI.," except that this defendant admits that under and pursuant to the directions contained in chapter 702 of the Laws of 1872, passed by the legislature of
12 the State of New York, a four-track steam railroad was constructed through the centre of the strip of land known as Park avenue, in the city of New York, and that upon the completion of the said railway structure, and for more than twenty years prior to the commencement of this action, trains of cars drawn by steam locomotives were operated upon the railroad constructed in such excavation, but denies that the portion of Park avenue occupied by said railroad structure, including the retaining walls which extended above the surface of said Park avenue, were ever subject to the plaintiff's easements, and except that it admits that under said lease the said railroad is, and has been, maintained and operated for the benefit of both defendants.

7. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VII."

8. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VIII.," except that it alleges, upon information and belief, that the defendant The New York Central and Hudson River Railroad Company intends to permanently maintain and operate the elevated railway viaduct structure erected by the board for the Park Avenue improvement above 106th street, under and pursuant to chapter 339 of the Laws of 1892, over a strip of land heretofore occupied by the said railroad constructed in the said cut or depression.

9. Denies each and every allegation of the complaint contained in the paragraphs thereof numbered "IX.," "X." and "XI."

10. Upon information and belief, denies each and every allegation of the complaint not hereinbefore or hereinafter specifically controverted or admitted.

13 Second.

For a further, second and separate defense this defendant alleges, upon information and belief, that prior to the commencement of this action, and on or about the 8th day of January, 1899, John Keirns, then the alleged owner of the premises described in the complaint herein, executed, duly acknowledged and delivered to Robert W. Cooper, a mortgage upon the premises described in the complaint herein to secure the payment of a large sum of money, to wit, the sum of $5,500, with interest, that the said mortgage was duly recorded in the office of the register of the city and county of New York; that the same remains undischarged of record, and that the owner thereof has not been made a party to this action.

Third.

For a further third and separate defense the defendant The New York and Harlem Railroad Company alleges upon information and belief:

That pursuant to the provisions of an act of the legislature of the State of New York, entitled "An act relative to improvements, touching the laying out of streets and roads in the city of New York and for other purposes," passed April 3d, 1807, and known as chapter 115 of the Laws of 1807, a map or plan exhibiting the public streets and avenues of the city of New York was duly made and filed April 1, 1811, exhibiting among other avenues, Fourth avenue, of the width of one hundred feet, extending from the southerly side of the Harlem river to and below Forty-second street.

That by the provisions of an act of the legislature, entitled "An act to incorporate the New York and Harlem Railroad Company," passed April 25th, 1831, and known as chapter 263 of the Laws of
14 1831, the defendant The New York and Harlem Railroad Company was incorporated and was authorized, among other things, to construct a railroad from any point on the north bounds of Twenty-third street to any point on the Harlem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, and that pursuant to the requirements of said act the defendant The New York and Harlem Railroad Company, duly located the route of said railroad and made a survey of such location and filed a map thereof in the register's office of the city and county of New York on the 22d day of October, 1831, the said map having been approved by a joint resolution of the common council, approved by the mayor, October 11, 1831, declaring their approval of the map and of the route of said railroad indicated thereon; that said railroad, as located as aforesaid, occupied a strip of land twenty-four feet in width extending from Twenty-third street to the Harlem river, the centre line of said strip coinciding with the centre line of Fourth avenue as laid down on said map, filed April 1, 1811.

That subsequently, and on the 22d day of December, 1831, the mayor approved an ordinance passed by the board of aldermen on the 16th day of December, 1831, and by the board of assistants on the 19th day of December, 1831, granting permission to said New York and Harlem Railroad Company to construct a railroad from Twenty-third street to the Harlem river, along Fourth avenue, in conformity with said map, and that said company, by articles of agreement executed January 9th, 1832, duly covenanted to perform all the conditions and requirements contained in said ordinance.

That after the incorporation of the defendant The New York and Harlem Railroad Company, and prior to the acquisition by
15 the city of New York of any title to any part of Fourth avenue, north of Forty-second street, the defendant The New York and Harlem Railroad Company acquired title in fee for the purpose of

constructing and operating its railroad thereon to a strip of land extending southerly from the southerly line of the Harlem river to Forty-second street, a portion whereof is in front of the premises described in the complaint, of the width of twenty-four feet, situate within the exterior lines of Fourth avenue, as designated on said map or plan, the centre line thereof coinciding with the centre line of said Fourth avenue, and also the right to slope any embankment or excavation of its railroad structure to the exterior lines of the said Fourth avenue; and that many years prior to the acquisition of any title by the city of New York to any part of Fourth avenue, the defendant The New York and Harlem Railroad Company, had constructed its railroad structure and had in operation its railroad upon the same, and its roadway acquired as aforesaid, and upon, along, above and below the grade of the adjacent land, and continued the operation of its railroad upon its railroad structure, as so located and constructed, until the changes required by the provisions of chapter 880 of the Laws of 1867, and by the provisions of chapter 702 of the Laws of 1872, as hereinafter set forth, were successively made.

That pursuant to the provisions of an act of the legislature, passed upon the memorial of the mayor, aldermen and commonalty of the city of New York, therefor, and entitled "An act to alter the map or plan of the city of New York," passed April 27th, 1837, and known as chapter 274 of the Laws of 1837, said Fourth ave-
16 nue was widened to the width of one hundred and forty feet, and the said widening from one hundred to one hundred and forty feet was by reason of the location and characteristics of the railroad and railroad structures theretofore built by the defendant The New York and Harlem Railroad Company, extending between Forty-second street and the Harlem river, and was for the purpose of giving an avenue of the necessary width for the increasing needs and population of the city of New York.

That the aforesaid acquisition of title by said defendant, The New York and Harlem Railroad Company, with the right to slope any embankment or excavation for its railroad structure to the exterior lines of said Fourth avenue, at that time one hundred feet in width as aforesaid, and the aforesaid construction by this defendant The New York and Harlem Railroad Company, of its railroad structure, and the aforesaid operation of its railroad upon the same and its roadway, was many years prior to the alleged acquisition by the plaintiff of title (if he acquired any title) to the premises described in the complaint, and to the erection of any building or buildings on said lands, and such acquisition of title, right of construction and operation of said railroad was pursuant to and by authority of said act of incorporation of said defendant The New York and Harlem Railroad Company, and of the acts amendatory thereof and supplemental thereto, and with the consent and acquiescence of the predecessor or predecessors in title (if the plaintiff has any) of the plaintiff.

That pursuant to the provisions of section six of an act of the legislature entitled "An act to amend an act entitled 'An act relating to the New York and Harlem Railroad Company,' passed May 7, 1840, and the acts amending the same," passed March 29th, 1848, and known as chapter 143 of the Laws of 1848, the New
17 York and New Haven Railroad Company (now known as the New York, New Haven and Hartford Railroad Company), a railroad corporation organized under the laws of the State of Connecticut, acquired from said defendant The New York and Harlem Railroad Company, the right to run the cars of the said New York and New Haven Railroad Company upon the tracks of said defendant The New York and Harlem Railroad Company, from a point of junction near Williams bridge, to and into the city of New York, and did, and ever since the year 1848 has, run its cars and trains upon the railroad of said defendant The New York and Harlem Railroad Company, from said point of junction to and along and upon said tracks from the southerly side of the Harlem river to Forty-second street.

That by proceedings instituted by the mayor, aldermen and commonalty of the city of New York, in or about the year 1850, for the opening of Fourth avenue (now known as Park avenue) from Thirty-eighth street to the Harlem river, resulting in an order of confirmation entered October 29th, 1853, the said city assumed to acquire title to the land between the exterior lines of Fourth avenue from Thirty-eighth street to the Harlem river, subject, nevertheless, to all the rights of the defendant The New York and Harlem Railroad Company, to maintain and operate its said railroad in said avenue.

That on the 10th day of May, 1867, the legislature passed an act entitled "An act for the protection of persons traveling upon Fourth avenue in the city of New York," and known as chapter 880 of the Laws of 1867, which in terms required and provided that the defend-
ant The New York and Harlem Railroad Company should
18 do certain work and perform certain acts, and among other things, that it should erect retaining walls upon the sides of its railroad below Ninety-second street, and between Seventy-eighth and Eighty-eighth streets, surmount said retaining walls with iron railings, and arch over its roadway from Eighty-eighth street to Ninety-second street, and that the city of New York should pay to the defendant The New York and Harlem Railroad Company one-half of the expense thereof, and that the filling in and grading about the said arch should be done by the city of New York, at its sole expense; and this defendant alleges that all the work and acts required to be done by said last mentioned act were duly performed.

That on the 14th day of May, 1872, the said legislature passed an act entitled "An act to improve and regulate the use of Fourth avenue in the city of New York" and known as chapter 702 of the Laws of 1872, whereby an established statutory grade and roadway between

Forty-fifth street and the Harlem river were provided for the said railroad of the defendant The New York and Harlem Railroad Company, and whereby said defendant was required to construct such viaducts, foot and road bridges over the same and such excavations and tunnels under the same, with openings for proper ventilation, as should be required by the plans and specifications of a board of engineers appointed by said act to execute, direct and superintend the said improvement; and also requiring one-half the cost of said improvement to be paid by the city of New York. That said improvement was accordingly carried out and the requirements of said act fully complied with and the railroad structure mentioned in the complaint as existing in front of the premises described in the complaint prior and up to the month of April,
19 1893, was constructed and has since been maintained and operated by the defendants pursuant to said last mentioned act.

That on the first day of April, 1873, said defendant The New York and Harlem Railroad Company leased all of its railroad from Forty-second street northwardly to the defendant The New York Central and Hudson River Railroad Company for a term ending April 1st, 2274, and that the said defendant The New York Central and Hudson River Railroad Company entered into possession and is now in the sole occupation and enjoyment of the said demised premises.

That on the 19th day of April, 1892, the said legislature passed an act entitled, "An act to regulate, improve and enlarge Park avenue above 106th street, in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridges, and for other purposes," and known as chapter 339 of the Laws of 1892; that said act was duly amended by an act of said legislature, passed May 8th, 1894, and known as chapter 548 of the Laws of 1894, and was also further amended by an act of said legislature passed May 13th, 1896, and known as chapter 594 of the Laws of 1896.

That under and pursuant to the provisions of section 13 of said act, chapter 339 of the Laws of 1892, the board therein designated as "the board for the Park Avenue improvement above One
20 hundred and sixth street," was duly appointed by the mayor of the city of New York, on or prior to the 29th day of April, 1892, was duly organized as required in said act on that date, and thereupon proceeded to and took entire charge and control of the improvement directed in said act, and still has entire charge and control of the same; that pursuant to the authority vested by said act as amended as aforesaid, and in obedience to its explicit directions, the said board entered into and executed certain

contracts with various parties for the construction and carrying out of said improvement, according to certain plans prepared by said board, approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, and that all the structures described in the complaint, including all temporary structures, required in the construction of said improvement, or necessary for the operation of trains during the making of said improvement, have been erected by such contractors under the sole supervision and control of said board, and in part at the expense of the mayor, aldermen and commonalty of the city of New York, as required by said act as amended as aforesaid, and that all the provisions of said chapter 339 of the Laws of 1892, as amended, have been and are being duly carried out and executed.

That all the changes in the original railroad bed and structures of the defendant The New York and Harlem Railroad Company, which have been or are being made, including all temporary structures, were and are necessary and requisite in order to carry out the provisions of the said acts, and were necessary and required for the purpose of and in order to regulate, improve and enlarge Park avenue in accordance with the provisions of the said acts, and that the defendant The New York and Harlem Railroad Company, has not operated any trains on said structure,
21 or any part of it, temporary or otherwise.

Fourth.

For a further fourth and separate defense the defendant The New York and Harlem Railroad Company alleges, upon information and belief, that for the pretended injuries or causes of action alleged in the complaint the plaintiff has a complete and adequate remedy at law, and that the plaintiff has no right to invoke the equitable interference of this court.

Fifth.

For a further fifth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to his predecessor or predecessors in title within twenty years next preceding the commencement of this action.

Sixth.

For a further sixth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to his predecessor or predecessors in title within ten years next preceding the commencement of this action.

Seventh.

For a further seventh and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein
22 or to his predecessor or predecessors in title within six years next preceding the commencement of this action.

Eighth.

For a further eighth and separate defense the defendant The New York and Harlem Railroad Company alleges:

That it entered into possession of that part of Park (formerly Fourth) avenue in front of, or adjacent to, the premises claimed to be owned by the plaintiff, which is now and heretofore has been occupied by the railroad and railroad structure of the defendant The New York and Harlem Railroad Company, under a claim of title, exclusive of any other right, founding such claim upon a written instrument or instruments as being a conveyance or conveyances of said premises or of the right, franchise and easement to construct, maintain and operate railroads thereon, and that there has been a continued occupation, possession and use of the said franchises, rights and easements included in said written instrument or instruments, or of some part thereof, by the defendant The New York and Harlem Railroad Company, and the defendant The New York Central and Hudson River Railroad Company, under said lease, for twenty years next preceding the commencement of this action, under the same claim.

Wherefore, the defendant The New York and Harlem Railroad Company demands that the complaint be dismissed, with costs.

FRANK LOOMIS,
Attorney for the Defendant, The New York
and Harlem Railroad Company.

Office and post-office address, Room 10, Grand Central depot, 42d St. and Vanderbilt Ave., New York city, N. Y.

23 CITY AND COUNTY OF NEW YORK, ss:

Edward V. W. Rossiter, being duly sworn, says that he is the treasurer of The New York and Harlem Railroad Company, the above-named defendant; that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. V. W. ROSSITER.

Sworn to before me this 1st day of Nov'r, 1897.

H. B. DWYER,
Notary Public, New York County.

The separate answer of the New York Central and Hudson River Railroad Company contains substantially the same allegations as the separate answer of the New York and Harlem Railroad Company.

24 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK & HARLEM RAILROAD COMPANY and The New York Central & Hudson River Railroad Company, Defendants. } Decision.

The issues in the above-entitled action having heretofore duly come on for trial before the Hon. Frederick Smyth, one of the justices of this court, on the 7th day of May, 1900, and the respective parties having appeared, and the cause having been duly tried and decision reserved, and the said justice having thereafter died, leaving the cause undetermined, and the same thereafter regularly coming on for trial before the Hon. Abraham R. Lawrence, one of the justices of this court, on the 5th day of November, 1900, and the respective parties having thereupon upon said trial duly stipulated in writing and in open court that the case be submitted for decision to the said justice upon the evidence as appearing in the stenographer's minutes of the testimony, and upon the exhibits used and put in evidence upon the said former trial before Mr. Justice Smyth, and upon the complete record of said trial, with the same force and effect as if the said justice then presiding had presided at the
25 time of the former trial, and that all said evidence and testimony was to be considered as being taken before said trial justice *nunc pro tunc*, as of the date of May 7th, 1900, and the submission having been made and the second trial having been had accordingly, and the said original records, exhibits, evidence and testimony having been duly read and submitted, and the same having been duly considered,

Now, therefore, I, said Abraham R. Lawrence, trial judge, do make this decision, stating concisely the grounds upon which the issues herein are decided, as follows:

First. The plaintiff is, and since April 12, 1882, has been the owner and in possession of the premises described in the complaint, and situated on the southeast corner of Park avenue and 114th street, having a frontage of 100 feet and 11 inches on said avenue, and has had during the period of his ownership, as aforesaid, certain easements of light, air and access in Park avenue and appurtenant to his said premises.

Second. During all the times herein mentioned the defendant The New York & Harlem Railroad Company was the owner of the railroad and railroad structures in Park avenue in front of the

plaintiff's premises, and the defendant The New York Central & Hudson River Railroad Company was at all such times the lessee of said railroad and structures under a lease, dated April 1st, 1873, for a period of 401 years from said date.

Third. Said railroad prior to August, 1894, was operated along the centre of said avenue, in front of the plaintiff's premises, on a masonry embankment or viaduct about 3 feet high and about
26 56 feet wide, and bounded on both sides by parapet walls of stone, having a height of about 5 feet above the surface of said avenue.

Fourth. The said defendant railroad companies, under and by virtue of the charter of the defendant, The New York & Harlem Railroad Company and the acts amendatory thereof and supplemental thereto, the various resolutions, consents, ordinances and acts of the mayor, aldermen and commonalty of the city of New York, the proceedings taken by the mayor, aldermen and commonalty of the city of New York, commenced in 1850 and consummated in 1853, the various acts of the legislature upon which said proceedings were taken to open Fourth (now Park) avenue from 38th street to 135th street, chapter 702 of the Laws of 1872, and the acts performed by the defendants thereunder; the lease of the New York & Harlem Railroad Company to the New York Central & Hudson River Railroad Company, dated April 1st, 1873, and all acts of acceptance, user and occupation on the part of the defendant railroad companies, and the lapse of time and the acquiescence of the plaintiff or his predecessors in title, acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to August, 1894, as hereinbefore described.

Fifth. In compliance with and pursuant to chapter 339 of the Laws of 1892, and under the supervision of the board for the Park Avenue improvement above 106th street, the masonry embankment or viaduct structure aforesaid was removed and a new permanent viaduct railroad structure of iron and steel was erected in the
27 place thereof by and for the use of the defendant railroad companies, said structure being about thirty-five feet high by about fifty-six feet in width.

During the said time, from October 1st, 1894, to September 6th, 1897, the trains of the defendant The New York Central and Hudson River Railroad Company were operated upon temporary structures or trestles erected partly over said embankment or viaduct and partly between the same and the curbline of said Park Avenue roadway and occupying said roadway between plaintiff's premises and said old viaduct or embankment. The existence of the temporary structure in said roadway in front of plaintiff's premises and the operation of trains thereon after October 1st, 1894, deprived the plaintiff of a portion of the light, air and access appurtenant to said premises, to which he was entitled.

The defendant, The New York Central and Hudson River Rail-

road Company began to operate its trains on the permanent structure on February 16th, 1897, and has since continued the same, and intends to permanently continue said operation, and the said permanent structure and the operation of trains thereon, are and since February 16th, 1897, have been a continuous trespass upon plaintiff's easements of light and air appurtenant to said premises and interference therewith and deprivation thereof.

Sixth. Defendants are not liable for any damage caused plaintiff by the mere construction of the temporary or permanent structures or anything incident thereto, but only for the increased damages caused by the maintenance of said structures and operation of the railroad.

Seventh. The rental value of said premises was depreciated in the period from September, 1894, down to and including May 7th, 1900, in the sum of $1,296, below what said rental value would
28 have been during said period if the change in defendant's said railroad in Park avenue in front of said premises, pursuant to chapter 339 of the Laws of 1892, had not been made; and the fee value of said premises has been and was on May 7th, 1900, depreciated in the sum of $2,525 below what said fee value would have been on said date if there had been no such change in defendant's railroad as aforesaid, taking into consideration in each case all benefits conferred by said changes.

The plaintiff is entitled to judgment as follows:

(1.) To a money judgment against the defendants for the sum of $1,296 with interest thereon from May 7th, 1900, to the date of the entry of judgment.

(2.) To an injunction restraining the defendants from the further maintenance and operation of the said viaduct structure and railroad in front of the plaintiff's premises on the southeast corner of Park avenue and 114th street above mentioned, but said injunction shall not be operative until thirty days after notice of entry of judgment herein, and if during the said period the defendants shall pay or tender to the plaintiff the sum of $2,525 and interest thereon from May 7th, 1900, the defendants shall be entitled to maintain and operate said structure and railroad in the future as it is at present maintained and operated and to receive from plaintiff a proper grant and conveyance of such right, together with a release or releases of all claims for damages on account of the maintenance and operation of said viaduct structure and railroad since May 7th, 1900, to be executed by all persons having any title to or lien upon said premises at the time of the execution and delivery thereof.
29 In case the defendants do not within such time acquire the right as against the plaintiff, as owner of said premises, to maintain and operate their viaduct structure and railroad, the injunction shall become operative.

I direct the entry of a judgment as above, with costs of the

action to the plaintiff, and with an extra allowance of one hundred and twenty-one dollars.

Dated New York, January 14, 1901.

ABRAHAM R. LAWRENCE, J. S. C.

(Endorsed:) "Filed January 18, 1901."

30 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK and HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Judgment.

The issues in the above-entitled action having been regularly brought on for trial before the Hon. Abraham R. Lawrence, justice, at a special term of this court, held on the 5th day of November, 1900, and said justice having made and filed a decision directing judgment in favor of the plaintiff and against the defendants, as hereinafter stated, and the plaintiff's costs having been duly taxed at the sum of $289 10/100,

Now, on motion of Atwater & Cruikshank, plaintiff's attorneys, it is adjudged,

I. That the plaintiff, John Keirns, recover of the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, the sum of $1,296, as damages for the trespasses of the defendants upon the premises on the southeast corner of Park avenue and 114th street, New York city, for the period from September, 1894, down to May
31 7th, 1900, with interest thereon from May 7th, 1900, to the date of the entry of this judgment, amounting to the sum of $54.22; also the sum of $289 10/100 for the plaintiff's costs in this action, amounting in all to the sum of $1,639 32/100, and that plaintiff have execution therefor.

II. That the defendants above named be and they hereby are enjoined and restrained from the further maintenance and operation of their viaduct structure and railroad in front of the plaintiff's premises on the southeast corner of Park avenue and 114th street, but said injunction shall not be operative until thirty days after notice of entry of judgment herein, and if during said period the defendants, or either of them, shall pay or tender to the plaintiff the sum of $2,525, and interest thereon from May 7th, 1900, the defendants shall be entitled to maintain and operate said structure and railroad in the future as it is at present maintained and operated, and to receive from plaintiff a proper grant and conveyance of such right, together with a release or releases of all claims for damages on account of the maintenance and operation of said structure and rail-

road since May 7th, 1900, the day of the trial of this action, to be executed by all persons having any title to or lien upon said premises at the time of the execution and delivery thereof.

In case the defendants do not within such time acquire the right as against the plaintiff, as owner of said premises, to maintain and operate their structure and railroad, the injunction shall become operative.

III. Any and every tender of delivery, notice or payment herein provided for shall be made by or to the attorneys for the respective parties.

IV. Every party to this action shall have leave to move at the foot of this judgment for further direction.

32 V. No execution shall issue upon the money judgment herein until thirty days after the notice of entry of judgment.

Dated New York, January 18, 1901.

(S'd) ABRAHAM R. LAWRENCE, J. S. C.

WILLIAM SOHMER, Clerk.

(Endorsed:) "Filed January 18, 1901."

33 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff, *against* THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants.	Exception to Decision.

Please take notice, that the defendants, and each of them, hereby except to the decision filed herein on the 18th day of January, 1901, and to each and every part of the same.

Dated borough of Manhattan, New York city, January 24, 1901.

Yours, &c., IRA A. PLACE, Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Atwater & Cruikshank, Esqs., attorneys for plaintiff, 115 Broadway, New York city, N. Y.; William Sohmer, Esq., county clerk of New York county, county court-house, N. Y. city, N. Y.

34 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants.

Notice of Appeal to Appellate Division.

Please take notice, that the defendants above named, and each of them, hereby appeal to the appellate division of the supreme court, first department, from the judgment in this action, entered and filed in the office of the clerk of the county of New York, on the 18th day of January, 1901, and from each and every part of said judgment.

Dated New York, January 24, 1901.

Yours, &c.,

IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Atwater & Cruikshank, Esqs., attorneys for plaintiff, 115 Broadway, New York city, N. Y.; William Sohmer, Esq., county clerk of New York county, county court-house, borough of Manhattan, New York city, N. Y.

35 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK & HARLEM RAILROAD COMPANY and THE NEW York Central & Hudson River Railroad Company, Defendants.

STATE OF NEW YORK,
County of New York, } *ss.:*

John A. Mattison, being duly sworn, deposes and says: That he is an attorney in the office of Ira A. Place, attorney for the defendants in the above-entitled action; that he — familiar with said action, and that no written opinion was given by the court at special term, other than the following memorandum, which appeared in the *Law Journal* of December 21, 1900:

"LAWRENCE, *J.*:

In this case I find that the plaintiff has sustained damage in the rental value of his property in the sum of $1,296, and in the fee value in the sum of $2,525. Draw decision and judgment according, with costs to the plaintiff and settle on three days' notice."

JOHN A. MATTISON.

Sworn to before me this 14th day of March, 1901.

ALBERT B. QUENCEY,
Notary Public, New York County.

36 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

The issues thus joined by the pleadings herein were tried before the Honorable Frederick Smyth, justice, at a special term, part IV., without a jury, on the 7th day of May, 1900. Justice Smyth having died without rendering any decision in the case, the same was, by consent of both parties, submitted to the Honorable Abraham R. Lawrence, justice, upon the record made upon the trial before the Honorable Frederick Smyth, to decide with the same force and effect as if tried before him.

Alfred B. Cruikshank, Esq., and J. E. C. Thomson, Esq., appeared for the plaintiff.

Charles C. Paulding, Esq., and Thomas Emery, Esq., appeared for the defendants.

It is admitted that this action was begun on September 23d, 1897.

Plaintiff's counsel offered in evidence original deed from Hannah R. Van Vechten to John Keirns, dated April 12th, 1882, and
37 recorded April 13th, 1882, in Liber 1660 of Conveyances, page 68, in the register's office, New York county, the expressed consideration being $9,350, conveying the premises in question by the description set out in the complaint.

Received and marked Plaintiff's Exhibit A.

Plaintiff's counsel offered in evidence abstract of chain of title of the plaintiff to the premises in question, commencing with the title of Peter Benson, who died seized of a large tract of land at Harlem known as the Third Avenue tract, in the year 1882, leaving a will and so on, as stated in the abstract. The deeds and papers stated in the abstract are considered in evidence.

Abstract received and marked Plaintiff's Exhibit B.

The foregoing Exhibits A and B are not printed in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein with the same force and effect as if so printed. In the event of their non-production they shall be deemed sufficiently described above.

Plaintiff's counsel offered in evidence a map produced from the register's office, filed therein November 12th, 1828, as number 115, entitled "Map of the Third Avenue tract, formerly the property of

B. P. Benson and Dr. Van Arsdale," and marked "Surveyed September 25th, 1825, by J. F. Bridges, New York."

Received and marked Plaintiff's Exhibit C.

The foregoing Exhibit C is not reproduced in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein with the same force and effect as if so
38 reproduced. In the event of its non-production it shall be deemed sufficiently described above.

Plaintiff's counsel offered in evidence the description contained in the deed from Benjamin L. Benson to Archibald Watt, referred to in the abstract, dated November 12th, 1828, recorded the same day in the register's office, New York county, Liber 241 of Conveyances, page 497, conveying "all those certain lots, pieces or parcels of land situate, lying and being in the twelfth ward of the city of New York, and known and distinguished on a certain map made of the lands of said Benjamin L. Benson by J. F. Bridges, city surveyor, bearing date September 25th, which map is now on file in the street commissioner's office in the city of New York, by the numbers and boundaries hereinafter mentioned. Also all that certain piece of land bounded as follows: Westerly by the Fourth avenue, easterly by a line drawn parallel to the Fourth avenue on the easterly side thereof and distant 400 feet therefrom, northerly by 114th street, and southerly by 113th street, which boundaries include lots numbered on said map as follows: 786, 787, 788, 789, 790, 791, 792, 793 and so on up to and including 817.

Received and marked Plaintiff's Exhibit D.

By PLAINTIFF'S COUNSEL: The premises in question include parts of lots 802 and 805 in that description.

Plaintiff's counsel offered in evidence chapter 115 of the Laws of 1807, which provided for laying out of the streets, including Fourth avenue, in the city of New York.

Received and marked Plaintiff's Exhibit E.

The foregoing statute is not printed in this case on appeal,
39 but may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so printed.

Plaintiff's counsel offered in evidence a copy of a map entitled "Map of the city of New York by the commissioners appointed by an act of the legislature passed April 3, 1807," showing Third, Fourth and Fifth avenues from 113th street to 121st street, and including the premises in question.

Received and marked Plaintiff's Exhibit F.

The foregoing Exhibit F is printed in the appendix to this case on appeal.

Plaintiff's counsel offered in evidence chapter 86 of the Laws of 1813, particularly section 178, which provides for the laying out of streets, including Fourth avenue.

Received and marked Plaintiff's Exhibit G.

The foregoing statute is not printed in this case on appeal, but

may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so printed.

Plaintiff's counsel offered in evidence deed from Benjamin L. Benson to the mayor, aldermen and commonalty of the city of New York, dated November 19th, 1825, recorded December 6th, 1825, in Liber 196 of Conveyances, page 261, conveying certain strips of land laid out as streets on the map of the city of New York, and among others Park (formerly Fourth) avenue, of the width of 100 feet in front of the premises in suit, the land conveyed being more particularly described as "all those parts of the tracts, pieces or parcels of land heretofore conveyed to the said party of the first part over which the Fourth avenue and 115th street run, pass or ex-
40 tend, as said avenues or streets are laid out by the commissioners of streets and roads in the city of New York, under and by virtue of the act entitled 'An act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes,' passed April 3d, 1807, together with all and singular," &c., "To have and to hold all and singular the said pieces or parcels of land hereditaments and appurtenances, and every part and parcel thereof, doth in and by these presents release and confirm unto the said parties of the second part and to their successors, to the only proper use and behoof of the said parties of the second part and their successors forever in trust, however, that the same be appropriated and kept open as parts of public streets and avenues forever in like manner as the other public streets and avenues in the said city are and of right ought to be, provided, nevertheless, and these presents are upon the express condition that nothing herein contained shall be construed to deprive the said party of the first part of the right in or property to the timber, trees, houses and other buildings and improvements standing, being and upon the pieces or parcels of land herein and hereby conveyed, or to prevent him, the said party of the first part, his heirs or assigns from appropriating the same to his or their own proper use and behoof upon the opening of the said streets and avenues whenever the said parties of the second part or their successors shall think fit to direct by resolution from time to time that any of the said streets or avenues be opened. And the said party of the first part for himself, his executors, administrators and assigns, doth covenant, grant,
41 promise and agree to and with the said parties of the second part and their successors, that he, the said party of the first part, his executors, administrators and assigns, shall and will, with all convenient speed after the execution of this instrument, at his and their own proper cost, charges and expense, cause the said Fourth avenue so far as the same extends over the said premises to be opened, and will make the same passable for horses, carriages, cattle and foot passengers, in the same manner and with the same degree of convenience as good country roads are passable."

Objected to by defendants' counsel as incompetent, immaterial and

irrelevant, as being no evidence of the opening of Park avenue as a street.

Objection overruled. Exception to defendants.

Received and marked Plaintiff's Exhibit H.

Plaintiff's counsel offered in evidence chapter 274 of the Laws of 1837, which provided for the widening of Park avenue, formerly Fourth avenue, to the width of 140 feet.

Received and marked Plaintiff's Exhibit K.

The foregoing statute is not printed in this case on appeal, but may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so printed.

Plaintiff's counsel offered in evidence petition, verified April 15th, 1850, in the proceedings entitled, "In the matter of the application of the mayor, aldermen and commonalty of the city of New York, relative to the opening of Fourth avenue from 38th street to the northerly line or side of 135th street, in the Twelfth and
42 Eighteenth wards of said city," and having attached affidavits showing the publication and posting pursuant to law.

By DEFENDANTS' COUNSEL: I take it that is offered for the purpose of showing the addition of 20 feet on each side of the avenue, and for no other purpose.

By PLAINTIFF'S COUNSEL: Yes.

Received and marked Plaintiff's Exhibit L.

The foregoing Exhibit L is not printed in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein with the same force and effect as if so printed. In the event of its non-production it shall be deemed sufficiently described above.

Plaintiff's counsel offered in evidence rule for the appointment of commissioners of estimate and assessment in the same proceeding, appointing Samuel Jones, John M. Pickney and Richard J. Smith, commissioners, filed April 22, 1850.

Received and marked Plaintiff's Exhibit M.

Plaintiff's counsel offered in evidence the oath of said commissioners, filed April 23, 1850.

Received and marked Plaintiff's Exhibit N.

Plaintiff's counsel offered in evidence order of the special term confirming the report of the commissioners in this proceeding, filed November 15, 1853.

Received and marked Plaintiff's Exhibit O.

Also order of the general term affirming order of the special term in the same proceeding, filed June 20, 1854.

By DEFENDANTS' COUNSEL: I object to the order of the special term on the ground that it is not the best evidence.

43 It is admitted that the report of the commissioners in that proceeding is not on file.

Objection overruled. Exception to defendants.

Received and marked Plaintiff's Exhibit P.

The foregoing exhibits—M, N, O and P—are not printed in this case on appeal, but may be produced and used on any appeal herein by either party with the same force and effect as if so printed. In the event of their non-production they shall be deemed sufficiently described above.

Plaintiff's counsel offered in evidence portion of damage map made in that proceeding, showing this property and showing the widening of Fourth avenue at this point.

Received and marked Plaintiff's Exhibit Q.

The foregoing Exhibit Q is printed in the appendix to this case on appeal.

It is admitted that the temporary structure referred to in this case was commenced in August, 1894, and that trains began running on the temporary structure in September, 1894.

It is also admitted that the operation of trains on the permanent structure began February 16, 1897.

Plaintiff's counsel offered in evidence plan showing the temporary structure of the railroad.

Received and marked Plaintiff's Exhibit R.

Plaintiff's counsel offered in evidence a map showing a comparative plan of the present permanent structure and the ground plan of the structure under the act of 1872.

Received and marked Plaintiff's Exhibit S.

The foregoing Exhibits R and S are printed in the appendix
44 to this case on appeal.

JOHN KEIRNS, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I am the plaintiff in this action, and I own the property described in the complaint, at the corner of 114th street and Fourth avenue. I bought that property in 1882 and paid nine thousand and some hundred dollars for it. The description mentioned in the deed is correct; that was in cash. At the time I bought the property there was a house on it, but it was unfinished. There was quite some work to be done in order to finish it. It cost in the neighborhood of $3,000. It was a three-story and basement brick house and the roof was on. The inside work was not completed. I did the plumbing, I put in the gas fixtures, I had the top floor plastered—the top floor was not finished. I put in bath-tubs along with the plumbing, wash-basins, &c., that was necessary on each floor. I put in a sewer, from the main sewer in the street to the rear of the building; I built a brownstone stoop, with iron railings, in the front. I flagged 100 feet on Fourth avenue and in front of the house, which amounted to something like 17 feet and some inches. The stairs were all up, the trim in the hall was not done and the parlor floor was not completed. I had to finish the trim on the inside.

Q. Was anything done in the yard?

A. Yes, sir; I had a door opening, an iron cellar door in the yard, from the rear of the house, the south end of the house—an opening doorway in the yard and stairs going up from the basement to the yard, which is there yet. I put on all the rear shutters of the house, as there was not any on; I put plumbing all through the
45 house, and range and copper boiler and gas fixtures. At that time I put the house in good condition, but it took quite a while to do it. I have owned the house ever since.

Q. In what condition is the house now as to repairs?

Objected to by defendants' counsel as calling for the conclusion of the witness.

By the COURT:

Q. How is the house now? Is it in good tenantable condition?

A. It has not been for some time. I say it is not in good tenantable condition from the fact that you cannot keep anything in the place. You cannot hoist a window or anything; you cannot hang out your clothes without their getting dirty and filthy. I refer to the operation of the road. The house is fairly good—as good as most any house. It looks all right on the inside, of course; it is in good repair. I have not heard any complaints.

I remember when the present structure was erected and know the year, and I owned the house at that time. They began to put up the temporary structure in 1894; I remember the structure that was there before. I do not live in this house; I have visited the house frequently; as a rule, about once a month. Sometimes I go there to collect the rent.

I have observed the operation of the defendants' railroad, and I took such observation before the present structure. In 1894 the railroad ran almost on the surface or a little higher than the surface of the street, and there was a large wall of masonry, a strong wall, built there, I think, with granite blocks. The wall was probably six feet high, and there was an iron railing on the top of it. The roadbed was a solid stone roadbed. The present structure is all built of iron that I saw.

In regard to the effect of the running of trains, I observed
46 that the noise is much greater than it was with the old roadbed; I also observed the smoke, which is intense there; on some occasions, when the wind blows it comes into your floor and rooms; and also cinders. There is no day in the year that you can't get a barrel of cinders on the roof, or very near a barrel. Those cinders come from the locomotive. The bed of the structure is a little higher, I think, than the parlor floor.

Q. State if there is any vibrations. As the trains pass do you notice any vibration to your house?

Objected to by defendants' counsel as immaterial and irrelevant and not within the pleadings.

Objection overruled. Exception to defendants.

A. I do. I know what vibration is. I never observed that there was vibration when the trains ran on the old solid structure.

I am getting $40 a month rent for the premises.

When I bought the premises in June, 1882, they were not occupied. I let them when I put the house in shape—finished it. It took me all summer to complete it, and I think I did not let it until along about October, 1882. The first tenant's name was Varley, and I got $65 a month rent. Mr. Varley stayed there one year. After that the rent was $65 for something over a year. Then I let it to a builder; he lives on the block yet. He paid me $65 a month, and stayed there something over a year. Mr. Lambert was the next tenant, and he is the present tenant. Mr. Lambert went in there between three and four years after I had it occupied—about 1887, I think. He paid about $55 a month, and continued to pay that up to 1894, which was the time that they began to erect the temporary structure, and then I got no rent at all for one year and a
47 month. I got no rent from January, 1895, to January, 1896. In January, 1896, I got $25 a month rent for the entire building; now I get $40 a month, and I think I have been getting that for going on three years.

I can describe fairly well the temporary structure which was erected there in 1894. The uprights were large wooden columns, and the sleepers rested on that overhead; they dug up the pavement on the avenue and sunk these girders about eight feet apart close up to the sidewalk, that is, the ones towards the east curbstone, they were close to the gutter; and they tore up more than one-half of the paving-stones along the avenue while doing that; then later on, when they got to working there, they had wooden uprights put up. I inquired what that was for, but I could not learn or ascertain what the partition was up for; by partition I mean fence. (Showing photographs to witness.) Those photographs represent the temporary structure.

Photographs offered in evidence by plaintiff's counsel.

Received and marked Plaintiff's Exhibits T and U.

The foregoing exhibits are not reproduced in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein with the same force and effect as if so reproduced. In the event of their non-production they shall be deemed sufficiently described above.

The building faces the west, the end of the building, the front faces north and the rear faces south. The house fronts on the street, and runs 100 feet on the avenue in depth. I think there are eleven windows fronting on the street looking north, and I think there are five windows on the side fronting on the avenue, and a bay window, may be more; I can't tell now. These photographs show
48 that fence or partition I spoke of. These photographs were taken, as near as I can recollect, in 1895, at the time the men were doing this work. The temporary structure went over the side-

walk near my house. There is an iron railing between my house and the sidewalk, which is about four feet and six inches from my house. This structure must have been sixteen feet from the side of my house; that is as near as I can get at it, but taking it to the bay window, it would not be over twelve feet; the bay window is on the west side of the house, and projects four feet and some inches from the building line.

They are running trains on this road constantly night time, as well as day time, but I don't know how many trains are running.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I live at 145 East 120th street, this city. I have been over in the night time at my house on Park avenue, sometimes earlier, sometimes later; I never was there later than eleven o'clock that I know of. I have seen trains running on that structure later than eleven o'clock within a month; I don't know what date it was.

Q. What time of night was it?

A. Probably nine o'clock, between nine and ten, I was on 125th street. Trains were running on the temporary structure when these photographs were taken. I think the fence that is shown in the photograph was right up to the curb. The place shown south of the lamp post is the place where the cars ran on the temporary structure. They did not curve off; they ran straight up and down the avenue. The lamp-post is close to the curb, and going that way is going south, but there is no turn there of the railroad—that photograph ends at that lamp-post.

49 Q. Isn't it a fact that the structure shown here, the one nearest your house on the west, was a sidewalk for trackwalkers?

A. There was no where else for the trains to run but there. I know there was a small walk for the employees of the railroad company to walk on between my house and the track.

I have no agent for this house; I act as my own agent and I never employed one; I tried to rent it when I was getting no rent. I am not now a real estate man. I live on a farm now occasionally during the summer, and my business now is that of a farmer; before that I was a policeman.

I fixed the rent at $40 a month for these premises, and I also fixed the rent at $25 a month and at $55 a month. Mr. Lambert is my tenant now, and I made the agreement of hiring with him. The highest rent he paid was $55 a month. I made the agreement that he should not pay me any rent from 1895 to 1896. The house was not empty during the time I did not collect any rent from it; the same family lived in it.

(By the COURT:)

Q. Why didn't you collect rent from that family?

A. They were going to move out, and I had to persuade Mr.

Lambert to have his wife remain to save me from hiring a watchman, and they agreed to stay there and take care of the premises, and I let them stay there without rent, so that they would look after the property. The first rent I got for this property was $65 a month, and I think I got that for a little over two years. I put it down from $65 to $55 because it was an unusual season of the year I commenced; it was along in the fall when Mr. Lambert moved in and houses were not letting very good, and I thought $55 was better from a good tenant than $65 from a poor one; I never attempted to raise the rent on him from the time he went in until he
50 stopped paying rent altogether; he never asked me to lower it.

I have seen cinders coming from the locomotives over to my house from daily trains they operated there; I did not notice how the locomotives or trains were marked. If the wind blows that way, smoke will come into my house; but if there is no wind, it don't go there. I have been on the roof with a painter when it was hard work to stand on it; there was wind then. I think there is more smoke and more cinders now than when the old structure six feet high was there. There is much more noise now from the present structure than there was from the old structure. I have been there within a month, but I did not notice any train going by at that time; I heard it; I am pretty sure that there was more noise from that than there was from the old structure. I think the noise now is about the same as it was a year ago. I can hear just as well now as I could a year ago.

Redirect examination—In answer to PLAINTIFF'S COUNSEL:

I made an effort myself to rent these premises, and I am collecting all the rent I can get.

KATE LAMBERT, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live in Mr. Keirn's house at 114th street and Fourth avenue, and have lived there since October 17, 1884; I have certainly noticed the effects from the operation of the defendants' railroad in front of these premises. I have observed trains passing up and down, a great many of them; there was smoke.

51 Q. Anything else?

A. You mean at the present time?

Q. Yes, and before?

A. It jarred the house to such an extent that all the walls were cracked.

Defendants' counsel moved to strike out the answer as not within the issues, because vibration is not made an element of damage.

Motion denied. Exception to defendants.

In answer to PLAINTIFF'S COUNSEL:

Q. Go on and state what else there was?

A. The windows were jarred, we could not hear ourselves speak, persons sitting in the room could not understand each other talking while the windows were open, particularly when the trains were passing in the morning, from half-past six until about nine, and from five until seven in the evening they were constantly going by, back and forth, sometimes four trains at a time. I mean four trains, two on each side of the structure; then it was impossible to hear each other speak; we had invariably to put the windows down; when I had the windows up, when the wind was blowing in the direction of the house we would get the cinders; they would go down in the area, on the roof of the extension and on the roof of the house also; I have invariably swept them off the roof. On the inside of the house it is very bad from the smoke and the cinders; it comes on our furniture and carpets and on the window-sills if the windows are closed, and I have the windows closed regularly to prevent all the dirt coming into the house; there is dust. I hear the noise of the trains and on our side two trains can pass. I notice the trains begin running in the morning around six o'clock; they run very frequently from that time until about nine o'clock, and in the
52 evening about five o'clock they commence running frequently, and from that time on until about seven o'clock, they seem to lessen the number after that.

I never counted the number of cars there were on the trains; there were sometimes four, sometimes more. These trains are propelled by steam locomotives.

I have noticed this noise and the dust and cinders since I have lived there.

I remember the old structure that was there on the surface of the street. There was always just the same noise, dust and cinders from the old structure as from the present one; the cinders come down with greater force against the house from the present structure, it being so much higher. It was opposite the parlor window before, now it is up opposite the fourth story; the train itself would be on a line with the fourth story. As the cars go by you can see the people sitting in them, not the top of the cars. The cars do not run much higher as to the living rooms of the house than they did before; when the wooden structure was there they did. The wooden structure was about on a level with the parlor windows; I mean by that that the side of the cars was about on a level with the parlor windows—you could see the passengers in the train. The passing of the trains past the windows affects the light in the parlor now, the rays of the sun don't come in as they used to; the light is not as bright as it was. When the cars are passing up and down in front of the windows it does not affect the light in the front but on the side, looking out on the track. I see the flash of the train passing only on the parlor floor.

Q. When you said the noise was as great in the former structure as it is now, did you mean the temporary structure, the wooden
53 structure, that *that* they had up there.

A. The temporary structure I had simply to keep my windows closed at the former time, but the temporary structure was simply unbearable.

Defendants' counsel objected to the answer.

Q. Why was it unbearable?

A. The noise came right in the windows; of course the condition of the place was altered terribly; water poured into the cellar from the structure, it was right up to the curb-stone, and the water poured right down to the cellar; I called one of the men off the road and they would come down and see the condition of the cellar, and he told me to sue the Central road, they could stand it.

Defendants' counsel objected to the latter part of the answer and moved to strike it out.

This water came from the temporary structure they had erected; the structure was a wooden structure, they erected it for the trains to run on, they had to take up the stone and put the beams against the curb-stone, which jarred the house and caused the water to run down the cellar. This water came from the street when it rained, instead of going through the gutter it would come down into the cellar. It came into the cellar from the side, the foundation was all broken. I called their attention to it and that was the answer he made me.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

This water came into the cellar every time it rained, the year the structure was there, which I believe was 1895. It has ceased to come in since they fixed it, which I believe was the year after they removed the structure—1897, I suppose. The water came into the cellar all the time the temporary structure was there.

54 CHARLES L. LAMBERT, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live in Mr. Keirn's house, and have lived there since October, 1884. I think there are ten rooms in that house and a bath room. The interior of the house is in fair repair from the landlord's standpoint. I went in there 16 years ago in October; that was in 1884. I first paid $55 a month rent and continued to pay that up to January, 1895. When I went in there the railroad in front of the premises was on a solid foundation. I remember the structure at that time. In 1894 the temporary structure was put up, but I cannot

say of my own knowledge how long that temporary structure continued, but it was a year or more. I did not pay any rent in 1895, because I threatened to move out. I told the landlord that I could not stay there as my wife objected to remaining there under the present condition, and we had some talk about it for a month or two before the first of January, and finally I told him I would move on the first of January; I would not pay any rent. Then he suggested to me that I stay there a while until things got better, and I could stay there without paying any rent. In 1896 the temporary structure may have been there, I would not say. In 1896 I paid $25 a month rent, and I paid that for one year; after that I paid $40 a month. I think the permanent structure was erected about the time the rent was increased from $25 to $40. When the temporary structure was erected, in 1894 or 1895, trains began to run on the temporary structure, which was a wooden affair, and was on the side of the old roadbed, while they were erecting the perma-
55 nent iron structure. I noticed the effects of the running of trains on the temporary structure and the noise was very disagreeable, very offensive. It was much more noisy than the old solid structure; much more dusty and more disagreeable.

In answer to the COURT:

The temporary structure was wood and the permanent structure was iron. I do not hear more noise since the iron structure has been put up there; there was more noise when the wooden structure was there.

In answer to PLAINTIFF'S COUNSEL:

There was much more noise on the trestlework than there was on the solid foundation, and more dust and cinders. When the change was made to the iron structure the effect as to dust, noise and cinders was much better than it was while the trestle was there, but it was more offensive than the old structure, and it is now.

Q. How do you compare the effects of the present structure with the effects produced by the running of trains on the solid roadbed prior to 1894?

A. There is more noise now than there was when the trains ran on the solid roadbed, and while that was there it gave us more privacy in the street; so in that respect it is more disagreeable now than it was then, and more noise and more cinders.

I think that wall was about ten to twelve feet high. That was a wall along the side of the old street-bed, and prevented a thoroughfare across the street; it afforded a sort of protection to our windows from the passing trains; there was no thoroughfare through there, and it made it a private street. As far as the dust and cinders are concerned, I don't see that there is much difference between the operation of the road now and the operation of the road on
56 the old roadbed; the principal difference is the noise. The roadbed is now much higher than it was in 1894; it runs

parallel with the top story of the house, and it formerly ran almost on the surface of the street. The noise of the passing trains can be heard more distinctly in the upper stories than formerly. I should say there was a difference in the dust and cinders on that account. Of course, there is more dust and cinders coming in when the windows are open; it covers everything in the room; in regard to the light, passing trains affect it more than when they ran on the original structure. Originally there was a wall there, but there is not now; so when you look out of the windows you see the trains pass. I cannot say how near the track is to the windows of the house; perhaps 35 or 40 feet. Trains go by very frequently, more frequently during some hours of the day than others; usually in the evening, between five and as late as nine o'clock they are very frequent; some at intervals of two and three minutes up to seven o'clock; then after that not so frequent, but enough to annoy you when you carry on a conversation. The noise of the passing trains is sufficient to interfere with conversation, so that you have to elevate your voice.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I threatened to move out in 1895 on account of the offensive surroundings. In the first place, when the trestlework was put up, there was a passage way made under the trestlework between the streets to enable the passengers to cross over from the east side of the street to the west side, and some of the neighbors on the other side, or wherever they might have come from, used to dump
57 garbage and ashes and all sorts of refuse under that trestlework.

Defendants' counsel moved to strike out the latter part of the answer.

By the COURT: He is answering a question as to why he threatened to move out.

WITNESS (continuing): Besides that some of the workmen that were working on the structure committed nuisance under the structure, and it was very offensive, and the trains rattling within a few feet of the windows made it very disagreeable. The water poured into the cellar on account of the way the pavement was put down; it poured right through the side of the house whenever it rained. That was while the temporary structure was there and until they got the present structure in shape. This water came into the cellar when they first tore up the pavement in order to build a temporary structure, which was some time in 1894, and it lasted until 1896 or 1897. I threatened to leave on January first, 1895; we had some talk some months before that; when the trouble first began I told him I could not stay there under the circumstances, and he said he thought it might be remedied—the water was the particular objection then, not the chief objection; the goings on under the trestlework by the neighbors and the workmen.

FRANK G. SWARTWOUT, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I am a real estate broker and appraiser, and my office is in the Mt. Morris Bank building, corner of 125th street and Park avenue.

I have been in the real estate business over twenty years, and
58 during that time have been carrying on business in Harlem in the city of New York. During that time I have carried on an active business in buying, selling and letting real estate. I have built property and had the care of property in New York during that time. I have appraised properties as a real estate expert during that period. It would be impossible to tell about how much real estate I have bought and sold in the city of New York during the last few years—between $2,000,000 and $3,000,000 a year. During that period the most of my business has been in the upper part of the city, both on the east and the west side.

I know this property of Mr. Keirns' corner of 114th street and Fourth avenue, and I have known it for the last twenty-five years, and I have been familiar with that neighborhood during that period and during the period I have been in business. I have bought, sold, rented and appraised real estate in that neighborhood during that time, and have been familiar with values during all that time. I have taken the *Real Estate Record and Guide* and have kept posted as to transactions as set forth therein, and have attended auction sales. I am acquainted with the value of the plaintiff's property and of property in that neighborhood for the last fifteen or twenty years. I have examined the premises of the plaintiff with a view to testifying as an expert in the case. The last time I examined them was this morning, and I had examined them a year or so ago. The premises consist of a three-story and basement brick and stone private dwelling house, located on the southeast corner of 114th street and Park avenue, 17 feet and 5 inches in width, and the lot 100 feet in depth, the house being about 40 or 45 feet deep. I do not know how many rooms there are in the house, but I should judge there

are about ten. I inquired and they said the house had all
59 the improvements. It seemed to be in very good repair.

I have noticed the structure of the defendants on which they operate their trains in front of the house; that structure prevents light and air and access. I remember the stone embankment upon which trains were run by the defendants prior to 1894.

Q. What difference, if any, exists between the present structure and the old structure with reference to the interference of light, air and access?

A. The present structure is much higher and wider, I should judge, and makes much more noise and smoke than there was to the old one; before, you could look right across the street and down the different streets and see the property on the opposite side; now you can't do it. When I was in the plaintiff's premises I observed the

effect of passing trains. There was a great noise, smoke, cinders, and you could feel the sidewalk fairly shake when the trains came along.

Q. Did that vibration affect the building at all, if you were sitting in the building?

A. Yes; the gas fixtures would shake, and anything that is anywhere loose in the house will rattle and make a noise when a train is passing along.

DEFENDANTS' COUNSEL: I except to the admission of the vibration as to the house.

There was no such effect as to vibration from the operation of trains on the former structure on the surface; it was a solid structure right on the ground and you felt no effect from it.

In my opinion the present value of these premises is $6,650. I consider the present rental value about $30 or $35 a month; that is, you could not get more than that. I consider that the value of the premises at the time the plaintiff bought it in 1882 as finished was about $12,500 or $13,000. In 1892, before the change in the structure of the railroad began, I valued the premises at $12,500.

The course of fee values on Fourth avenue at this point from 1892 to the present time, say from 110th street to 116th street, on the east side of the avenue, has been downward. Values have fallen 25 to 50 per cent.

The course of rental values has been downward, about 25 to 50 per cent. The rental value of these premises in 1892 was about $60 a month.

The first avenue to the west of Fourth avenue, running in the same direction, is Madison avenue. The course of values on Madison avenue at this point, from 1892 to the present time, has been upwards, about 25 to 50 per cent. There is no elevated railroad on Madison avenue, and has not been during that period.

The next avenue running parallel to this avenue on the east is Lexington avenue. The course of values on Lexington avenue, from 1892 to the present time, has been upwards, 25 to 50 per cent.

The course of values on the side streets between Madison and Lexington avenues, and from 110th to 120th streets, from 1892 to the present time, has been upwards, that is on the side streets up to within 200 or 300 feet of Park avenue, about ten per cent., and within 200 or 300 feet of Park avenue the course of values has been downwards, 10 to 15 per cent., and in some cases more.

Q. What fact has existed during that period which distinguishes that portion of the side streets within 200 feet of Park avenue from other portions of the side streets?

A. The change of the structure on Park avenue, increasing the noise principally.

I said the value of the plaintiff's premises in 1892 was $12,500.

Q. State the values for the succeeding years down to the
61 present time?

A. 1893, $12,000; 1894, $11,250; 1895, $10,750; 1896, about the same as 1895; 1897, $8,000; 1898, $7,500; 1899, $7,000; and 1900, $6,650.

There have not been many sales of property on Fourth avenue in this neighborhood within the last few years. There has been a number of foreclosures, about all the transfers or sales there have been foreclosure sales. Since 1893 and 1894 it has been almost impossible to let or sell property on Park avenue. In 1892 there was no difficulty in renting or selling property on Park avenue in this neighborhood.

Q. Comparing those three avenues—Lexington, Madison, and Park avenues—and the course of values there as they ran generally prior to 1892 in that neighborhood, above 110th street, has there been much difference in the course of values on those three avenues?

A. They were practically the same values, that is the corner of Madison, Lexington, and Park avenues and 114th street were practically the same, were worth the same price, and the general course of values had been about the same prior to 1892.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I was familiar with the old structure prior to 1894. That was a solid wall some feet high. It blocked up the avenue, and was a continuous wall right along the avenue. I think it was about 50 or 60 feet wide; now there is no wall there; the avenue is open under this structure outside of the columns, and the columns are placed in the street; all crossing the street. I have forgotten how many rows of heavy iron columns there are under this structure.

You can cross Park avenue at any point now from one side
62 to the other, but you could not do that before. You could not cross 114th street at grade before.

I never measured the height of this old wall, but I should judge it was about six or seven feet high, something like that, that is the wall and the railing on top of it. I should say the top of the parlor windows of this house are about six or seven feet above the curb; I never measured the height of the under beams of the new structure, but I should judge they are about 25 feet from the street to the top. The new structure is about 60 feet wide, and is a four-track road.

Q. What houses have you had on Lexington avenue for sale or have sold since 1892?

A. At 116th street, 124th street, 118th street, 128th street, 122d street and 109th street. The property at 116th street is the southeast corner. It is a five-story apartment house with store. I sold the lot on which the building stands for $26,000, I think it was. My brother-in-law bought the lot at auction about six months be-

fore, and I think he paid $20,000 for it. I cannot say when the last sale of that property was previous to that.

The property at the corner of 118th street and Lexington avenue was a three-story brownstone house, similar to the one in question, and was on the south-west corner. I sold that property during the nineties; I have forgotten what year it was; I think it was along about 1894.

I know the property at the north-east corner of Lexington avenue and 114th street; it is a four-story flat and store, brownstone front. I do not know that that property was recently sold.

The rental value of this property in suit in 1892 was $720; in 1893 it was about $700; in 1894 about $600; in 1895, $500; in 1896, about the same; in 1897, about $30 to $32 a month; in 1898
63 and 1899, about the same, and at the present time about the same.

I know the properties 103, 105, 107 East 114th street; that is about opposite the property in suit. I don't know that any of those properties sold recently; I have one for sale, No. 105. It is a three-story brownstone, similar to the house in suit. I sold 121 and 123. I sold those houses seven or eight years ago.

I know the property on the northeast corner of 116th street and Madison avenue; it is a seven-story apartment house and store; I do not know whether it was sold in 1898, but I know it has been sold several times. The last sale I know of was to Roberts & Ronkow within the last six months. It was reported as sold for $150,000. The broker who sold it told me he sold it for $150,000, or $160,000, I forget which. It was a trade. I do not know about the rents of that building.

I do not know the premises 116, 118 and 120 East 116th street.

I know the properties 73, 75, 77, and 79 East 116th street, built in 1890 by Mr. Gallagher; private dwellings. They are about 150 feet from Park avenue, I think. When those properties were sold when they were built they sold for $16,000 or $17,000. To the best of my recollection, they are 150 or 200 feet from the avenue; I believe they have been sold since they were first sold, but I don't know what they sold for; I know they sold for less.

In 1893 the value of the lot in question was $9,000 and the house $3,000. In 1896 the value of this property was $10,750, the same as it was in 1895. The value of the lot at that time was $8,250. In 1896 a full lot in this locality was worth about $12,000. I obtained the value of $8,250 for this lot by placing the value of a full
64 lot at $12,000. The size of this lot is 17 feet 6 inches front and rear and 100 feet deep.

Q. How much did you figure as the difference?

A. I figured it at so much per foot and deducted 25 per cent. of the balance on account of its being a small lot.

Plaintiff rests.

Defendants' counsel moved to dismiss the complaint on the following grounds:

1. That the plaintiff has failed to show that either of the defendants performed any of the acts complained of.

2. That the plaintiff has failed to show that he had any property or property rights which has been taken by either of the defendants.

3. That the only loss or inconvenience shown is that resulting from the tearing up of Park avenue for the reconstruction of the defendants' railroad by the board for the Park Avenue improvement, pursuant to legislative authority and direction.

4. That all of the acts complained of have been not those of the defendants or either of them, but of the board for the Park Avenue improvement above 106th street, a public body established by chapter 339 of the Laws of 1892, their contractors and agents.

5. That the plaintiff is barred by his own laches and acquiescence and the laches and acquiescence of his predecessors in title from maintaining this action.

6. That the defendants have obtained by prescription the
65 right to obtain and operate the permanent railroad structure consisting of an embankment prior to the acts done under chapter 702 of the Laws of 1872, and also under said act existing in Park avenue, in front of the plaintiff's premises, during the entire period for which damages are sought in this action, without liability for damage.

7. That the defendants have obtained by prescription the right to maintain and operate any lawful railroad structure either upon, below or above the surface of Park avenue, within the lines of the viaduct structure erected under the act of 1872, without liability to the plaintiff for damages, it appearing that the viaduct railroad structure in the course of erection opposite the premises described in the complaint during the period for which damages are claimed in this action has been erected wholly within the space occupied by the defendants for railroad purposes for more than twenty years prior to the commencement of this action.

8. That no material additional interference with the use and enjoyment of plaintiff's premises has been shown by reason of the elevation of the defendants' railroad upon a permanent viaduct structure.

9. That the plaintiff has failed to show any loss in fee or rental value from his premises due to the maintenance of the structure erected under chapter 702 of the Laws of 1872.

10. That the plaintiff has failed to show any loss in fee or rental value of his premises due to the permanent structure in course
66 of erection during the period for which damages are sought in this action, under chapter 339 of the Laws of 1892 or under chapter 548 of the Laws of 1894.

11. The plaintiff has failed to show any loss in fee or rental value of his premises due to the maintenance of the temporary wooden

trestle, or the operation of trains thereon, from the first day of February, 1895, or whatever date the record shows, to the 15th day of February, 1897. That the plaintiff is not entitled to recover any damages in this action against the defendants by reason of the use of the temporary wooden trestle opposite the plaintiff's premises in suit, such trestle not having been erected by the defendants, but by the board for the Park Avenue improvement, under due legislative and municipal authority, and shown to be necessary in the carrying out of the acts directed by chapter 369 of the Laws of 1892, and chapter 548 of the Laws of 1894.

12. That plaintiff has failed to show that the defendants, or either of them, have been guilty of any acts of negligence in maintaining the viaduct railroad structure erected under chapter 702 of the Laws of 1872, or in the operation of trains on said structure, or in the operation of trains upon said viaduct structure or structures, erected under chapter 339 of the Laws of 1892.

13. That the plaintiff has an adequate remedy at law.

14. That the plaintiff has failed to make out a case for equitable relief.

15. That upon the completion of the railroad structure
67 in 1874 or 1875, erected under chapter 702 of the Laws of 1872, the municipal authorities abandoned to the defendants for the sole and exclusive use of their railroad a strip of land along the centre of Park avenue about 58 feet in width, some portion of which had theretofore been devoted to the uses of a public street, subject to the rights of the railroad company. That the plaintiff himself, and his predecessor in title, for more than 20 years prior to the commencement of this action, acquiesced in such abandonment, and the defendants have by continued and exclusive use of said strip of land for railroad purposes, acquired the right as against the plaintiff to maintain and operate any railroad structure authorized and required by law on said strip of land, whether above or below the established grade of Park avenue.

Motion denied. Exception as to each ground on behalf of each of the defendants.

Defendants' counsel offered in evidence chapter 263 of the Laws of 1831.

The foregoing statute is not printed in this case on appeal, but may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so prihted.

Defendants' counsel offered in evidence resolution dated September 13, 1831, by the directors of the New York and Harlem Railroad Company, laying out the railroad, with map and profile of the same.

Received and marked Defendants' Exhibit 2.

The same is printed in the appendix to this case on appeal.

Defendant's counsel also offered in evidence ordinance of the common council of the city of New York, dated December 16,
68 1831, authorizing the New York and Harlem Railroad Company to construct their railroad.

Received and marked Defendants' Exhibit 3.

Defendants' counsel also offered in evidence agreement between the New York and Harlem Railroad Company and the mayor, aldermen and commonalty of the city of New York, dated January 9, 1832.

Received and marked Defendants' Exhibit 4.

The foregoing Exhibits 3 and 4 are printed in the appendix to this case on appeal.

Defendants' counsel offered in evidence deed, dated January 18, 1832, from Benjamin L. Benson to the New York and Harlem Railroad Company, and recorded in the office of the register of the city and county of New York, in Liber 338 of Conveyances, page 518, August 18, 1835.

Received and marked Defendants' Exhibit 4 A.

The same is in the words and figures following, to wit:

"This indenture, made this eighteenth day of January, in the year of our Lord one thousand eight hundred and thirty-two, between Benjamin L. Benson, of the Twelfth ward of the city of New York, party of the first part, and the New York and Harlem Railroad Company, parties of the second part,

Witnessed, that the said party of the first part, for and in consideration of one dollar, lawful money of the United States of America, to him in hand paid, at or before the ensealing and delivery of these presents by the said parties of the second part, the receipt whereof is hereby acknowledged, and they, the said parties of the second part, and their successors from every part and parcel thereof, for-
69 ever discharged by these presents, doth give, grant, bargain, sell and demise unto the said parties of the second part, and their successors, all that certain piece of land situate, lying and being in the twelfth ward of the city of New York, being part of one of the avenues laid out on the map of the city of New York as the Fourth avenue, and is included within a space of 24 feet wide, running through the centre of said avenue and between 106th street and 116th street, and is bounded and described as follows, viz.:

Northerly by the old road leading from Harlem to Harlem lane and McGown's pass; southerly by land of Mrs. Margaret McGown, and east and west by lines drawn parallel to the centre line of the 4th avenue at the distance of twelve feet on each side thereof.

To have and to hold the said premises and messuage above mentioned, with the appurtenances unto the said parties of the second part, and their successors, from the day of the date hereof, for and during the full period of time, during which the said parties of the second part may remain an incorporated company, and on which they are to construct their railroad, and for no other purpose, with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted, as

may be necessary to support their work, not, however, extending beyond the width of the avenue.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

BENJ. L. BENSON. [SEAL.]

Signed, sealed and delivered in the presence of
I. ADRIANCE.

70 CITY AND COUNTY OF NEW YORK, ss:

On this first day of February, A. D. 1832, before me personally appeared Benjamin L. Benson, who is personally known to me, and he acknowledged to me that he executed the same as his act and deed for the uses and purposes therein mentioned. I allow it to be recorded.

I. ADRIANCE,
Com'r of Deeds in the City of New York."

Defendants' counsel offered in evidence petition of property owners in that neighborhood, and resolution of the common council as to the widening of Fourth avenue.

Received and marked Defendants' Exhibit 5.

The foregoing Exhibit 5 is printed in the appendix to this case on appeal.

Defendants' counsel offered in evidence chapter 702 of the Laws of 1872.

The foregoing statute is not printed in this case on appeal, but may be produced or referred to by either party upon the argument of any appeal herein, with the same force and effect as if so printed.

Defendants' counsel offered in evidence copy of a part of a map entitled "Plan and profiles of work to be done in conformity with the provisions of section 6 of the act entitled 'An act to improve and regulate the Fourth avenue in the city of New York,' passed May 14th, 1872," and upon which is endorsed "By order of the board, New York, June 26th, 1872. I. C. Buckhout, superintending engineer 4th Ave. improvement."

Received and marked Defendants' Exhibit 7.

The same is reproduced in the appendix to this case on appeal.

71 Defendants' counsel offered in evidence contract dated April 1, 1873, between the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company, whereby the former leased to the latter its steam railroad north of 42d street, including the railroad opposite the premises described in the complaint, for the term of 401 years from the first day of April, 1873, for a certain annual rent therein specified, together with its rolling stock and other property, including its beneficial interest in a certain "tripartite lease," dated November first, 1872,

between the parties to said contract and the New York, New Haven & Hartford Railroad Company.

Received and marked Defendants' Exhibit 8.

The foregoing Exhibit 8 is not printed in this case on appeal, but may be produced and used upon the argument of any appeal herein by either party with the same force and effect as if so printed. In the event of its non-production it shall be deemed sufficiently described above.

Defendants' counsel offered in evidence chapter 907 of the acts of Congress dated September 19th, 1890, requiring bridges over the Harlem river to be raised to a height of 24 feet above tide water.

Also chapter 339 of the Laws of 1892.

The foregoing statutes are not printed in this case on appeal, but may be produced or referred to by either party upon the argument of any appeal herein, with the same force and effect as if so printed.

Defendants' counsel offered in evidence a map entitled "Plans for the improvement of Park avenue above 106th street in the
72 city of New York, exhibiting by map, profile and cross sections the work of alteration and changes to be made in the structure of the New York & Harlem railroad on Park avenue, between 106th street and Harlem river in the city of New York, prepared for filing in the office of the comptroller of the city of New York in conformity with the provisions of chapter 339 of the Laws of the State of New York, approved April 19, 1892. Approved November 10, 1892, Charles W. Dayton, president; Jas. H. Haslin, secretary; Walter Katte, superintending engr.; John Fox, G. W. Birdsall, the board for the Park Avenue improvement above 106th street; also endorsed "Approved November 10, 1892, Thos. F. Gilroy, commissioner of public works, city of New York," filed in the office of the comptroller of the city of New York, November 12, 1892, signed "Theo. W. Myers, comptroller."

Received and marked Defendants' Exhibit 11.

The foregoing plan is not reproduced in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein, with the same force and effect as if so reproduced. In the event of its non-production it shall be deemed sufficiently described above.

Defendants' counsel offered in evidence "Amended plan for the improvement of Park avenue, above 106th street, in the city of New York," approved June 14, 1894, by Michael F. Daly, commissioner of public works in the city of New York, and filed in the office of the comptroller of the city of New York, June 21st, 1894.

Received and marked Defendants' Exhibit 12.

The foregoing Exhibit 12 is reproduced in the appendix to this case on appeal.

73 Defendants' counsel offered in evidence chapter 548 of the Laws of 1894.

The foregoing statute is not printed in this case on appeal, but

may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so printed.

Defendants' counsel offered in evidence a map entitled "Comparative profiles of the railroad structure at various dates," showing the profiles of the different structures with the railroad grade at that place. This map shows the surveys of the avenue in 1831, the grade of the railroad from 1835 to 1872, the grade of the railroad from 1872 to 1896, the grade of the railroad in 1897 and the grade of Park avenue.

Received and marked Defendants' Exhibit 14.

Defendants' counsel offered in evidence map showing temporary trestle at 114th street, the plan of the structure.

Received and marked Defendants' Exhibit 15.

The foregoing Exhibits 14 and 15 are reproduced in the appendix to this case on appeal.

PLAINTIFF'S COUNSEL: As we understand the court of appeals decision in the Lewis case, the court holds that the plaintiff can only recover for the maintenance and operation of the trestle work from the date when the railroad company began to operate trains upon it, and for the maintenance and operation of the permanent structure from the date when the railroad company began to operate trains upon the permanent structure, and we will limit our claim in that manner.

74 GEORGE H. THOMPSON, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

My occupation is that of civil engineer and consulting engineer. I have been in practice as a civil engineer 36 years, and during that time my work has consisted principally of the construction of railroads and structures pertaining to railroads, bridges, &c.

I was retained by the New York Central & Hudson River Railroad Company in 1892 or 1893 to make a plan for the structure on Park avenue, and I made such a plan. In the plan which I made the proposed structure commenced at the Harlem river on the northern end, and at the southern end, I think, at 112th street, possibly 111th street; that plan was adopted. I have watched the structure during the progress of the work. The original plan provided for rock ballast, but it was not put in at first; it has been put in within a year, and the whole structure is now ballasted. The effect of that ballast as to noise and the operation of trains upon the structure is to reduce the noise or intensity, transmission, &c.

JOSEPH H. FRANKLIN, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at 14 East 125th street, and I am manager of the Grand Central Depot and the Harlem line. I have charge of the running of the trains between the Grand Central depot and the Harlem river, and I have had charge of that work since 1892. I am
75 familiar with the number of trains that ran in Park avenue, between the Grand Central depot and the Harlem river, prior to 1892.

They have four separate tracks there, running four trains on them—two each way.

I am familiar with the number of trains that run in Park avenue now between the Grand Central depot and the Harlem river. There are four tracks on the present structure, two for north-bound trains and two for south-bound trains; the south-bound trains run on the east side, and the north-bound trains on the west side, and on the old structure they ran the same way. The structure is ballasted with stone at the present time.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

The number of trains a day that run up and down Park avenue averages about 475.

Q. What is the space of time between each train?

A. That depends on the hours; in the morning, from seven o'clock, they are only two or three minutes apart, and from four o'clock to seven o'clock in the evening about the same. I mean 475 trains both ways.

Q. How many cars are there to a train on an average?

A. We count every engine or anything that goes over the line a train, an engine alone; I don't think they would average over four cars to a train. Those cars will average about 65 feet in length.

Q. What is the weight of the engine?

A. We have different classes of engines; we have engines from 60 tons up to 100 tons. We run all kinds of engines on this structure, from 60 to 100 tons in weight; I suppose the express trains have the largest engines. The speed of the express trains, which run over this structure at 114th street, will average about 25 miles
76 an hour. The local trains that make stops run slower at that point; those that stop at 110th street would not go over 10 or 15 miles an hour. There is another station at 125th street.

Re-direct examination—In answer to DEFENDANTS' COUNSEL:

The locomotives passing over this structure burn hard coal; some burn soft coal; those that burn soft coal carry coke, and burn coke within the city limits.

In answer to PLAINTIFF'S COUNSEL:

There has been no material change in the number of trains in the last two years. The same number of trains ran over the temporary structure as are now running over the permanent structure.

LORENZO S. PALMER, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at No. 35 West 132d street. My business is that of a real estate broker and appraiser. My office is in the Twelfth Ward Bank building, 147 East 125th street. I have been a real estate broker and appraiser between 15 and 16 years, and during that time my office has been principally in Harlem. During that time I have bought and sold houses and different kinds of properties in the neighborhood of Park avenue and 114th street. I have examined this property at the southeast corner of 114th street and Park avenue within a week. I went through the property. The house is 17 feet 6 inches by about 45 feet, and the lot is 100 feet in depth running along the avenue.

The present value of the property is $13,000; $9,500 for the lot, and $3,500 for the building.

77 I was familiar with the value of property in Harlem in this neighborhood in 1892. The value of this property in 1892 was $11,500; $6,500 for the lot and $5,000 for the building. I was familiar with the value of property in that neighborhood in 1892. The value of this property at that time was $11,000; $6,500 for the lot, and $4,500 for the building. I was familiar with the value of property in that neighborhood in 1896. The value of this property at that time was *was* $10,500; $6,500 for the lot, and $4,000 for the building.

I am familiar with the rental values of property in Harlem in that neighborhood. The present rental value of that property at 114th street and Park avenue is $55 a month, or $660 a year. Its rental value in 1892 was about the same, and in 1894 about $600 a year, and in 1896 about $540 a year.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

I have been in business for myself since October, 4th, 1889. I am 34 years of age.

I have sold property in this neighborhood at 114th street and Park avenue. I sold property directly opposite the plaintiff's property in 1894. I sold property in the same street, just farther west. I have sold property in Fourth avenue; No. 1642, 25 feet north of 116th street on the west side of Park avenue. I sold that in 1893. I sold the north-west corner of 102d street and Park avenue last month. I have sold nothing else on Park avenue.

I am in business alone.

I said the property that I sold in 1893 was on the west side of Park avenue, 25 feet north of 116th street. I believe that property has been sold since I sold it in 1893, but I don't know just what
78 year it was sold, but I think in the neighborhood of 1896 or 1897. I think it was sold the last time on the exchange, and I believe it brought $19,000. I sold it in the spring of 1893 for $23,500. It has been sold since but I don't know at what price.

My business is buying and selling; I do very little letting; it is mostly buying and selling.

I have rented property on Park avenue. I rented the northwest corner of 117th street and Park avenue in 1889—1887, 1888. Since that I rented the southwest corner of Park avenue and 116th street, in 1892. I don't know as I ever rented any on Park avenue since 1892.

The course of fee values on Park avenue for the last three or four years up to 1897, until this new structure, was about stationary. It was stationary since about 1891 or 1892 to 1897.

The course of values on Madison avenue from 1892 to 1897 in that neighborhood has appreciated possibly 15 per cent.

The course of fee values in Lexington avenue in that neighborhood from 1892 to 1897 was about stationary.

The course of rental values on Park avenue from 1892 to 1897 has depreciated about 10 per cent. From 1897 to the present time there has been an appreciation of about 15 per cent. The rentals on Park avenue, in this neighborhood, are about the same at the present time as they were in 1892.

The course of rental values on Madison avenue from 1892 to the present time in this neighborhood has been about stationary, and from 1892 to 1895 it was stationary, and from 1895 to 1900 it was stationary.

Defendants' counsel offered in evidence photograph showing the property in question, the street, and also the structure.

Received and marked Defendants' Exhibit 16.

79 The foregoing Exhibit 16 is not reproduced in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein, with the same force and effect as if so reproduced. In the event of its non-production, it shall be deemed sufficiently described above.

Defendants' counsel renewed his motion to dismiss the complaint on all the grounds stated at the close of the plaintiff's case.

The foregoing case on appeal contains all the evidence, exceptions and proceedings taken and had upon the trial of the above action.

(Here follows diagram marked p. 80.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

81 PLAINTIFF'S EXHIBIT F.

Upon the original map, of which the preceding is a partial copy, is inscribed the following:

"The commissioners appointed by an act entitled "An act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes," passed April 3, 1807, certify this map to be made in conformity with the provisions of said act, and in witness thereof have hereunto subscribed their names and affixed their seals the twenty-second day of March in the year of our Lord one thousand eight hundred and eleven.

GOUV'R MORRIS.
SIMEON DE WITT.
JOHN RUTHERFORD."

(Here follow diagrams marked pp. 82, 83, & 84.)

85 & 86 DEFENDANTS' EXHIBIT 2.

Upon the original map, of which the preceding is a partial copy, is inscribed the following:

"At a meeting of the board of directors of the New York and Harlem Rail Road Company in the city of New York on Tuesday the 13th September 1831, it was resolved that the line of the route of their rail road be through the centre of the Fourth avenue from the north side of 23rd street to Harlem river and also that the line of the route of the branch of the same be through the centre of 125th St. from the centre of the 4th avenue to the Hudson river and that the maps of the same as made by Edwin Smith city surveyor be presented to the common council of the city of New York for *the* approval previous to the filing of the same in *the* pursuance of the requirements of the act of incorporation.

Witness- of hands and seals,

CAMPBELL P. WHITE.
ISAAC ADRIANCE.
I. L. JESSUP.
A. HOSACK.
HENRY HONE.
JOHN LOZIER.
JOHN MASON.
SAM'L F. HALSUP."

87 DEFENDANTS' EXHIBITS 3 AND 4.

New York and Harlem Railroad.

Articles of agreement made this ninth day of January, one thousand eight hundred and thirty-two, between the New York and Harlem Railroad Company, parties of the first part, and the Mayor, Aldermen, and Commonalty of the City of New York, parties of the second part.

Whereas, an ordinance of the common council of the city of New York was passed by the board of aldermen on the sixteenth day of December, last, and by the board of assistants on the 19th day of December last, and approved by the mayor of said city on the twenty-second day of December last, which ordinance is in words and figures following, to wit:

A Law to Authorize the New York and Harlem Railroad Company to Construct Their Railway.

SECTION 1. Be it ordained, etc., That the New York and Harlem Railroad Company be, and they hereby are, permitted to construct

and lay down, in pursuance of their act of incorporation, a double or single track or railroad, or railway, along the Fourth avenue, from Twenty-third street to the Harlem river, in conformity with a map now on file in the register's office, and a branch thereof along One hundred and twenty-fifth street from the Fourth avenue to the Hudson river, provided that the width of such double railroad or way shall not exceed twenty-four feet.

SECTION 2. And be it further ordained, That if, at any time after the construction of the aforesaid railways by the said New
88 York and Harlem Railroad Co., it shall appear to the mayor, aldermen and commonalty of the city of New York, that the said railways, or any part thereof, shall constitute an obstruction or impediment to the future regulation of the city, or the ordinary use of any street or avenue (of which the said mayor, aldermen and commonalty shall be the sole judges), the said railroad company, or the directors thereof, shall, on the requisition of the said mayor, aldermen and commonalty, forthwith provide a remedy for the same, satisfactory to the said mayor, aldermen and commonalty; or, if they fail to find such remedy, they shall, within one month after such requisition, proceed to remove such railway, or obstruction or impediment, and to replace the street or avenue in as good condition as it was before the said railway was laid down; and, should the said directors decline or neglect to obey such requisition, the said mayor, aldermen and commonalty, may, upon the expiration of the time limited in such notice, cause the obstruction or impediment to be removed, and the avenues or streets restored as aforesaid, at the expense of the said railroad company.

SECTION 3. That the right of regulating the description of power to be used in propelling carriages on and along said railways, and the speed of the same, as well as all other power reserved to the said mayor, aldermen and commonalty, by the act of incorporation of the said company, or any part thereof, be, and the same are hereby, expressly retained and reserved.

SECTION 4. That it shall expressly be incumbent on the said New York and Harlem Railroad Company, at their own cost, to construct stone arches and bridges for all the cross streets now or hereafter to
be made (which will be intersected by the embankments or
89 excavations of the said railroad), and which, in the opinion of the common council, the public convenience requires to be arched or bridged, and also to make such embankments or excavations as (in the opinion of the common council) may be required to make the passage over the railroad and embankments, at the intersected cross streets, easy and convenient for all the purposes for which streets and roads are usually put to; and also, that the said company shall make at their own like cost and charges, all such drains and sewers as their embankments and excavations may (in the opinion of the common council) make necessary; all which work to be done under the like requisition, and under like disabilities, as in the second section of this ordinance mentioned. And

further, that the said company shall make their railroad path, from time to time, conform to what may hereafter be the regulation of the avenue and road through which said railroad passes.

SECTION 5. That it shall be incumbent on the said New York and Harlem Railroad Company to commence and complete their said railroad in the respective times allowed for that purpose in their act of incorporation; and unless they commence and complete the same in the periods of time for the said commencement and completion in said incorporation specified, that then the consent of the common council, and all the powers and privileges given in this ordinance, shall cease and be null and void.

SECTION 6. That in case the said railroad should not be completed within the times for that purpose in their charter mentioned, or, if any time after the construction of the said railroad, the same should be discontinued, or not kept up and in repair as a good and sufficient railroad, that then the strip of land to be taken for the
90 said railroad should be thrown open and become a part of the street or public avenue, without any assessment on the owners of the adjoining land or the public therefor.

SECTION 7. That no building shall be erected on the said strip of land to be taken for said railroad, and that a railing or other erections shall be made on the outer edges of the embankments or railroad path, and also such railing or fences on the edges of the excavations, as the common council shall, from time to time, deem necessary to prevent accidents and loss of lives to our fellow-citizens.

SECTION 8. That this ordinance shall not be considered as binding on the common council, nor shall the said ordinance go into effect until the said Harlem Railroad Company shall first duly execute (under their corporate seal) such an instrument in writing (promising, covenanting and engaging, on their part and behalf, to stand to, abide by and perform all the conditions and requirements in this ordinance contained) as the mayor and the council of the board shall, by their certificate approve, and not until such instruments shall be filed, so certified, in the comptroller's office of this city.

Passed by the board of aldermen, December 16, 1831.

Passed by the board of assistants, December 19, 1831.

Approved by the mayor, December 22, 1831.

Now, this agreement witnesseth, that for and in consideration of the premises, and in pursuance of the requirements of the eighth section of said ordinance, the said parties of the first part do hereby for themselves and their successors, promise, covenant and engage to and with the said parties of the second part and their suc-
91 cessors and assigns, to stand, abide by and perform all the conditions and requirements in the said ordinance contained.

In witness whereof, the said parties of the first part have hereunto affixed their corporate seal and caused the same to be signed by

their vice-president (in the absence of their president), and attested by their secretary, the day and year aforesaid.

JOHN MASON, [L. S.]
Vice-President.

Witness:
ISAAC ADRIANCE,
Secretary *pro tem.*

92 To the honorable the common council of the city of New York:

The memorial of the undersigned, owners of property on Fourth avenue, respectfully represents that the central position of the said avenue, terminating, as it does, at Union place and forming the outlet for that large portion of the population which passes through Broadway and the Bowery and the occupation of the middle part of the avenue for the Harlem railroad render it extremely desirable that its width should be increased to one hundred and forty feet. By thus widening it, convenient thoroughfares on each side of the railroad will be afforded, as well as ample accommodations for the numerous vehicles with which the avenue must otherwise ere long be crowded and obstructed. The undersigned, therefore, respectfully ask that the common council will take the necessary measures to have the map of the city so altered as that the Fourth avenue may, throughout its whole length, be rendered of the width of one hundred and forty feet, and your memorialists as in duty bound will ever pray, etc.

New York, May —, 1835.

ISAAC ADRIANCE.
W. B. LAWRENCE.
ARCH. WATT.
SAMUEL SWAN.
CHAS. HENRY HALL.
P. POILLON.
WM. SHERWOOD,
Four Lots at 110th Street.
ENOCH WISWALL.
S. M. LEVENGSTON,
Sixteen Lots on the Avenue.
ANTHONY ARNOUX,
Twelve Avenue Lots.
JNO. R. PETERS.
ANSON BLAKE,
Fourth Avenue and Forty-third, Forty-fourth, and Forty-fifth Streets.
GEO. FAIR AND
ABR'M LOE RUWOOD,
Seventy-four Lots between Fourth and Fifth Avenues and Forty-fourth and Forty-fifth Streets.

93 To the honorable the corporation of the city of New York:

The undersigned owners and lessees of property on the Fourth avenue in the city of New York respectfully represent:

That they have observed a notice of the street commissioner, that a petition has been laid before your honorable body for the widening of the Fourth avenue to one hundred and forty feet—against the granting of which petition the undersigned do respectfully but most earnestly remonstrate for the following reasons:

First. Because the taking of twenty feet additional from the lots now improved by several of the undersigned would cause the demolition of their dwellings, ruin their property and retard its improvement and thereby compromise their rights as citizens of this great Republic.

Second. Because it is perfectly unnecessary, as the public convenience does not require it, nor the probable amount of travel on said avenue warrant it, for it will be relieved from any excess by Irving place and the Third and Fifth avenues, which are also one hundred feet avenues and judged to be of sufficient width to accommodate all the travel which may at any future time be requisite.

Third. Because the expense of widening would far exceed any possible benefit which could be derived from the increase of width, as it is estimated that the cost of widening south of Thirty-fourth street alone would be at least two hundred thousand dollars.

Fourth. Because the expense makes it perfectly ineffectual, as the assessments consequent on the injury to property would in
94 fact amount nearly to a confiscation of the property on each side of the avenue and there would be no one to pay it.

Fifth. Because the agitation of such a question at this time gives a bad impression in regard to property on this avenue by retarding improvements.

Sixth. Because if more carriage room should at any time be required, that object could be attained by narrowing the sidewalks which are quite spacious.

The undersigned, therefore, respectfully request that they may be heard further before the committee on the subject, and request that they may be personally notified whenever the subject may be discussed.

New York, Sept. 19, 1835.

PETER COOPER,	BENJ. W. VICKAR,
GILES BUSHNELL,	I. GREEN PEARSON,
SAM. B. RUGGLES,	E. INGHAM SCHIEFFELIN,
CHARLES C. KING,	SILAS WRIGHT,
JAS. LEARY,	WILLIAM LOVE,
ALLAN McKENZIE,	JOHN WATTS,
ELLIS EDGAR,	EDM. WILKES,
ROB'T PETTIGREW,	HENRY WILKES,
N. B. MOUNTFORD,	HORATIO WILKES,
G. A. FURST,	E. B. BOSTWICK,
D. C. TAYLOR,	WILLIAM KENT,
SAM. BROOKS,	ROB'T CENTER,
CHAS. S. LIVINGSTON,	WM. REID,
A. TIEMANN,	JOHN W. VICKAR,
J. B. W. VICKAR,	SAM'L W. MOORE,

Board of Ass. Ald.

The committee on roads and canals to whom was referred the annexed petition for widening the Fourth avenue throughout its whole extent to 140 feet width and the remonstrance against the same, respectfully report, that your committee have given
95 the same a thorough examination, have caused the same to be advertised and have heard the parties in favor of and opposed to the measure.

The petitioners represent that the centre of this avenue is now occupied by the railroad, and that from its central position, it will become a great thoroughfare for the population in that part of the island.

Your committee are aware of the importance of these considerations, and they are of opinion that the proposed alteration would be beneficial to the avenue and a great improvement to the property in that neighborhood.

There has been but little objection to the same above Twenty-eighth street, and though your committee think that it is desirable to widen the same to Union place, yet inasmuch as a majority of the owners below Twenty-eighth street have opposed the measure, your committee do not recommend that this extension should take place lower down than Twenty-eighth street.

There are but few buildings now erected on this part of the avenue, and the alteration cannot be made at any future period at a less expense than at the present time.

It is not proposed to open it at present, but to alter the map of the city so that whenever the Fourth avenue is opened, it shall be 140 feet in width and so as to prevent the erection of buildings on the avenue when so widened.

Your committee therefore submit the following resolution:

Resolved, That the map or plan of the city be altered so as to make the Fourth avenue 140 feet wide by adding twenty feet on each side of the same from Twenty-eight street to Harlem river.

D. P. INGRAHAM,
JOHN V. GREENFIELD,
Committee on Roads and Canals.

96 *Resolved*, That the counsel of the board take the necessary measures to procure a law of legislature authorizing such alteration.

To the honorable the corporation of the city of New York:

The undersigned, a resident and owner of property on the Fourth avenue, begs leave to represent to your honorable body that he has learnt with regret that a petition is now before your honorable body for widening said Fourth avenue to the width of 140 feet, against the granting of which petition the undersigned most urgently remonstrates and requests of your honorable body a consideration of

the very great inconvenience and sacrifice of property resulting therefrom. The improvements made by the undersigned between Twenty-ninth and Thirtieth streets, in erecting two substantial brick houses could not at this time be accomplished for the sum of eighteen thousand dollars, which would be wholly demolished and ruined. Twenty-five thousand dollars would not be a sufficient compensation for the loss and injury which would result to the undersigned, without his deriving any possible advantage therefrom.

Your honorable body will perceive by the slight draft which accompanies this communication that the proposed widening would deprive the undersigned of so much land as to prevent his making further improvements and render the portion left him almost valueless. For instance, the lot on the corner of Twenty-ninth street with brick house thereon contains in depth but seventy-six feet; to take therefrom twenty feet would leave only a fifty-six foot lot for him to rebuild on.

The undersigned is owner of ten lots of lands on the Fourth avenue between Twenty-ninth and Thirty-first streets (two of
97 which are leased to a religious society on which they are now erecting a church), several of which are so peculiarly situated in regard to depth that the taking of twenty feet therefrom would amount almost to a confiscation of the property, as it would render them nearly useless for improvements.

The undersigned, therefore, respectfully requests that the proposed widening of Fourth avenue may not be extended below Thirty-fourth street or Murry's square, as it would not then interfere with any improved property, but prevent the ruination of the lots and buildings below. Not one owner, as is believed, having petitioned for, but, on the contrary, are opposed to the said widening.

New York, January 4th, 1836.

GILES BUSHNELL.

Board of Aldermen.

The street committee, to whom was referred the accompanying papers from the board of assistants in relation to widening the Fourth avenue twenty feet on each side, respectfully report, that they concur with the committee of the board of assistants in their report on this subject as to the propriety and expediency of widening the avenue; but recommend an amendment to the resolution appended to the report by making the widening commence at Thirty-fourth street instead of Twenty-eighth street. There are some valuable buildings between Twenty-eighth and Thirty-first streets which the committee think inexpedient to disturb, and as it is not recommended to widen the avenue throughout its whole extent to
98 Union place, they can perceive no reason why the widening shall not commence at Thirty-fourth street, which will not

only avoid the expense of removing these buildings, but be more suitable, as Thirty-fourth street is the northern termination of a square laid out on each side of the Fourth avenue between Thirty-first and Thirty-fourth streets, called Murray Hill square. They therefore recommend the adoption of the resolutions passed by the board of assistants with an amendment to the first resolution by striking out from the third line the words "Twenty-eighth street" and inserting the words "Thirty-fourth street," so that the resolution as amended will read as follows:

Resolved, That the map or plan of the city be altered so as to make the Fourth avenue 140 feet wide by adding twenty feet on each side of the same from Thirty-fourth street to Harlem river.

EDWARD TAYLOR,
R. R. WARD,
NICH. WATERBURY,
Street Committee.

Board of Ass. Ald.

The street committee to whom was referred the annexed papers from the board of aldermen relative to the widening of the Fourth avenue, respectfully report that they recommend a concurrence in the amendment adopted by the board of aldermen.

C. S. WOODHULL,
W. W. HOLLY,
C. D. FOREST,
Street Committee.

New York, Feb'y 13th, 1837.

99 & 100 Board of Aldermen.

Resolved, That the map or plan of the city be altered so as to make the Fourth avenue 140 feet wide by adding twenty feet on each side of the same from Thirty-fourth street to Harlem river.

Resolved, That the counsel of the board take the necessary measures to procure a law of the legislature authorizing such alteration.

Adopted by the board of aldermen, Jan. 30, 1837.
Adopted by the board of assistants, Feb'y 14, 1837.
Approved by the mayor, Feb'y 17, 1887.
New York, April 17, 1893.

I hereby certify that the foregoing paper is a true copy of the documents on file in this office.

MICHAEL F. BLAKE,
Clerk Common Council.

101 DEFENDANTS' EXHIBIT 7.

The original map, of which the preceding is a copy, is entitled as follows:

"Plan and profiles of work to be done in conformity with the provisions of section 6 of the act entitled 'An act to improve and regulate the Fourth avenue in the city of New York,' passed May 14th, 1872."

And upon which is endorsed

"By order of the board, New York, June 26th, 1972.

I. C. BUCKHOUT,
Superintending Engineer 4th Ave. Improvement."

(Here follow maps marked pp. 102, 103, 104, & 105.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

106 Pursuant to section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing are copies of the judgment roll, papers, notice of appeal and case and exceptions in this action on file in the office of the clerk of the county of New York.

Dated New York, March 23, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

It is hereby consented that the within-printed case on appeal may be ordered on file as and for the original case on appeal, as settled herein.

Dated New York, March —, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

It is so ordered.

Dated New York, March 25, 1901.

ABM. R. LAWRENCE, J. S. C.

107 At a term of the appellate division of the supreme court for the first department, held at the court house of the appellate division in the county of New York, on the 29th day of April, 1901.

Present: Hon. Charles H. Van Brunt, P. J.; William Rumsey, Morgan J. O'Brien, George L. Ingraham, Edward W. Hatch, J. J.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.
} Order of Affirmance.

The defendants having appealed to this court from the judgment in this action, entered in the office of the clerk of the county of New York on the 18th day of January, 1901, in favor of the plaintiff and against the defendants, for the sum of $1,639.32 damages and costs and for an injunction, and the said appeal having duly come on to be heard, and having been duly argued by Ira A. Place, Esq., for the appellants, and Alfred B. Cruikshank, Esq., for the respondent and due deliberation having been had thereon;

Now, on motion of Atwater & Cruikshank, attorneys for the plaintiff-respondent, it is

Ordered, that said judgment be and the same hereby is affirmed with costs and disbursements to the respondent.

108 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants. } Judgment of Affirmance.

The defendants above named having appealed to the appellate division of this court from the judgment entered herein on the 18th day of January, 1901, in the office of the clerk of the county of New York, in favor of the plaintiff and against the defendants, and said appeal having been duly heard by said appellate division, and the said judgment having been affirmed, with costs to the plaintiff, by the appellate division, as appears by the remittitur from said appellate division, duly filed in the office of the clerk of the county of New York on May 7th, 1901, and the costs of the plaintiff having been duly taxed at the sum of eighty-eight and 75/100 dollars;

Now, on motion of Atwater & Cruikshank, attorneys for plaintiff, it is

Adjudged, that the said judgment entered herein on January 18th, 1901, be and it hereby is in all things affirmed; and it
109 is further adjudged, that the plaintiff, John Keirns, recover of the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, the sum of eighty-eight and 75/100 dollars, costs of said appeal, and that execution issue therefor.

Dated New York, May 7, 1901.

WILLIAM SOHMER, Clerk.

110 Supreme Court, Appellate Division, First Department, April, 1901.

Charles H. Van Brunt, P. J.; William Rumsey, Morgan J. O'Brien, George L. Ingraham, Edward W. Hatch.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Judgment affirmed, with costs. No opinion. (Van Brunt, P. J., dissenting.) 60 App. Div. Reports, 630.

STATE OF NEW YORK, County of New York, } ss.:

Charles C. Paulding, being duly sworn, deposes and says: That he is an attorney and counselor-at-law, and is of counsel for the de-

fendants in the above-entitled action, and is familiar with the different proceedings in the action; that the foregoing memorandum was handed down by the appellate division upon the decision of the appeal herein, and no opinion was rendered.

CHARLES C. PAULDING.

Sworn to before me this 23d day of September, 1901.

JOHN A. MATTISON,
Notary Public, New York County, N. Y.

111 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants-Appellants.

Notice of Appeal to the Court of Appeals.

SIRS: Please take notice that the defendants above named and each of them hereby appeal to the court of appeals from the judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of New York county on the 7th day of May, 1901, upon an order entered in the office of the clerk of the said appellate division on the 6th day of May, 1901, adjudging that the judgment entered in this action in the office of the clerk of New York county on the 18th day of January, 1901, in favor of the above-named plaintiff and against the defendants, which judgment awarded the plaintiff herein an injunction unless the defendants paid the sum of twenty-five hundred and twenty-five dollars fee damages, and further awarded the plaintiff a money judgment against the defendants for the sum of twelve hundred and ninety-six dollars, be affirmed, with two hundred and eighty-
112 nine and 10/100 dollars costs to the plaintiff, and from each and every part of said judgment.

Dated borough of Manhattan, N. Y. city, N. Y., May 22, 1901.

Yours, &c.,
IRA A. PLACE,
Attorney for Defendants-Appellants.

Office and post office address, room 417 Grand Central station, borough of Manhattan, New York city, N. Y.

To William Sohmer, Esq., county clerk of the county of New York, county court house, borough of Manhattan, New York city, N. Y.; and

Atwater & Cruikshank, Esqs., attorneys for plaintiff-respondent, 34 Cedar street, borough of Manhattan, New York city, N. Y.

113 In the Court of Appeals.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.

Stipulations under Sections 3301 and 1353 of the Code.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the judgment roll, papers, notice of appeal to the appellate division of the supreme court, case and exceptions, of the order of the appellate division, and of the judgment entered thereon, and of the notice of appeal to the court of appeals, on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated borough of Manhattan, New York city, N. Y., September 24, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

114 Opinion of Court of Appeals.

JOHN KEIRNS, Respondent,
v.
THE NEW YORK AND HARLEM R. R. CO. ET AL., Appellants.

(Decided February 24, 1903.)

Appeal from a Judgment of the Appellate Division of the Supreme Court in the First Judicial Department Affirming a Judgment Entered upon a Decision of the Court After a Trial at Special Term.

Ira A. Place for appellants.
Alfred B. Cruikshank for respondent.

Per Curiam:

Judgment reversed and the complaint dismissed without costs upon the authority of Fries *v.* N. Y. & Harlem R. R. Co. (169 N. Y. 270), and Muhlker *v.* N. Y. & Harlem R. R. Co. (173 N. Y. —).

VANN, J. (concurring):

The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (Lewis *v.* N. Y. & Harlem R. R. Co., 162 N. Y. 202.) The essential facts of the

two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was discovered by a majority of the court that was not raised by counsel or considered by us in the former case. (Fries *v.* N. Y. & Harlem R. R. Co., 169 N. Y. 270.)

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the company's user for twenty years acquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the State had the right to require the grade upon which the railroad was run to be changed; to cause to be erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

115 This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners and a gift thereof to railroad corporations, I now yield to it as establishing the law of the State, since the principle upon which it rests has been sanctioned and applied in another case by this court. (Muhlker *v.* N. Y. & Harlem R. R. Co., 173 N. Y., —).

I concurred in the dissenting opinion of Judge Cullen in the *Fries* case and should have concurred in that of Judge Bartlett in the *Muhlker* case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

Parker, Ch. J., Bartlett, Haight, Martin and Werner, JJ. (and Vann, J., in memorandum), concur; Gray, J., not sitting.

Judgment reversed, etc.

116 At a special term, part II, of the supreme court, held in and for the county of New York, at the county court house in said county, on the 31st day of March, 1903.

Present: Hon. Samuel Greenbaum, justice.

JOHN KIERNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The defendants herein having appealed to the court of appeals of the State of New York from a judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of the county of New York on the 7th day of May, 1901, upon an order entered in the office of the clerk of said appellate division on the 6th day of May, 1901, adjudging that the judgment entered in this action in the office of the clerk of the county of New York on the 18th day of January, 1901, be affirmed, with costs, and the said court of appeals having directed that the said judgment be reversed and the complaint dismissed without costs, and having directed that the record of the proceedings be remitted to this court to be enforced according to law, and the said remittitur having been duly filed in the office of the clerk of the county of New York: now on
117 motion of Ira A. Place, Esq., attorney for the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, it is

Ordered that the judgment of the said court of appeals be, and the same hereby is, made the judgment of this court, and that this order and the judgment to be entered hereon be annexed to the judgment roll.

S. G.,
J. S. C.

118 Supreme Court, New York County.

JOHN KIERNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The judgment herein, in favor of the plaintiff and against the defendants, having been entered in this court on the 18th day of January, 1901, upon a decision of the Hon. Abraham R. Lawrence, J., for an injunction and for the sum of one thousand six hundred and thirty nine and thirty two hundredths dollars ($1,639.32), and the defendants having appeared from said judgment to the appellate division of the supreme court for the first department, and the said

judgment having been affirmed by the said appellate division and judgment of affirmance having been accordingly entered therein on the 7th day of May, 1901, and the said defendants having appealed therefrom to the court of appeals, and the said court of appeals having sent hither its remittitur, filed herein on the 31st day of March, 1903, by which it appears that the said court of appeals has reversed the said judgment so appealed from, without costs, and has given judgment accordingly, and has remitted its said judgment to this court to be enforced according to law, and this court having, by order dated the 31st day of March, 1903, and duly entered herein,
119 ordered that the said judgment of the court of appeals be made the judgment of this court, now on motion of Ira A. Place, Esq., attorneys for the defendants herein, it is

Adjudged that the judgment of said court of appeals be, and the same hereby is, made the judgment of this court; and it is further

Ordered and adjudged, that the said judgments of the supreme court herein so appealed from, be and the same hereby are, reversed and the complaint dismissed without costs.

Judgment signed and entered this 31st day of March 1903.

THOS. L. HAMILTON, Clerk.

M. J. D.

119½ [Endorsed:] Supreme court, New York county. John Kierns, plaintiff, against The New York & Harlem Railroad Co., *et al.*, defendants. Judgment on remittitur from court of appeals. Ira A. Place, defendants' att'y.

120 In the Supreme Court of the United States.

PATRICK KIERNS, as Executor, etc., Plaintiff in Error,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants in Error.
} Assignment of Errors.

Afterwards, to wit, on the seventh day of January, in the year of our Lord, one thousand nine hundred and four, in this same term before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes Patrick Kierns representing the original plaintiff and plaintiff in error herein, and by his attorneys and counsel Henry G. Atwater and Alfred B. Cruikshank, says:

That in the record, proceedings, decision and final judgment of the court of appeals of the State of New York, and of the supreme court of the State of New York aforesaid, in the above entitled suit or action, there is manifest error in this, to wit:

I. That by the record, aforesaid, it appears that the judgment aforesaid given, was given by the court of appeals of the State of New York against the said John Kierns, the original plaintiff, and in favor of The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error; whereas, by the law of the land the said judgment ought to have been given for the said John Kierns against
121 the said New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company.

II. That the said court of appeals of the State New York erred in holding and deciding that the complaint of the original plaintiff should be dismissed.

III. That the said court of appeals of the State of New York erred in holding and deciding that, under the statute authorizing or requiring the erection and maintenance of the elevated railroad structure and the operation thereon of trains as complained of by the original plaintiff, the plaintiff in error has no remedy against the defendants in error and defendants in error below, herein; thereby holding and deciding that the said plaintiff might be and has been deprived of his property by said defendants without due process of law; the said court of appeals thus holding and deciding in violation of the Constitution of the United States and especially of section I, article XIV of the amendments to said Constitution.

IV. That the said court of appeals of the State of New York erred in holding that chapter 339 of the Laws and Statutes of 1892 of the State of New York, is constitutional and that it does not offend against that portion of the fourteenth amendment to the Constitu-
122 tion of the United States, providing that a person shall not be deprived of property without due process of law; whereas in fact and in law the said act and statute is repugnant to section I, of article XIV of the amendments to the Constitution of the United States; and further that whereas the property of the said plaintiff, as shown by said record and proceedings consists of rights and easements of light, air and access in and over Park or Fourth avenue, a public street in the city of New York, appurtenant to the premises of the said plaintiff in error, abutting on said avenue, the said court of appeals of the State of New York erred in deciding in favor of sustaining the validity of said act and statute of said State, the effect of which has been to deprive said plaintiff of said property without due process of law.

V. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under chapter 339 of the Statutes of 1892 of the State of New York, namely, the authority to take by or on behalf of the defendants in error and defendants below, the said plaintiff's property, consisting of rights and easements of light, air and access appurtenant to his said premises, without compensation to him and with-

out due process of law, in violation of section I of article XIV of the amendments to the Constitution of the United States.

123 VI. That the said court of appeals of the State of New York erred in holding and deciding that the said State had authority and that the authority exercised by the State and under the statute aforesaid was valid to compel or allow defendants in error to maintain a railroad viaduct and to operate trains of cars thereon in front of said property rights and easements, of the said plaintiff in error and that the said defendants in error were under no liability to compensate said plaintiff in error therefor, or for the injury inflicted upon his said premises by reason of such maintenance and operation, and that the taking of a portion of the property of the plaintiff in error in the manner complained of, was and could be made valid by statute, that is by chapter 339 of the Laws of 1892 of the State of New York; and that said holding and decision of said court of appeals, was, and is repugnant to section I of article XIV of the amendments to the Constitution of the United States.

VII. That the said court of appeals of the State of New York erred in holding that chapter 339 of the New York Laws of 1892 is constitutional and that it does not contravene section 10 of article I of the Constitution of the United States forbidding the impairment of the obligation of contracts; whereas in fact and in law the said act is repugnant to the said section in that it does impair the obligation of a contract, namely, the contract under which Park or Fourth

124 avenue in the city of New York was dedicated as a public street in and by the deed from Pater Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827, and set forth in the record of the proceedings herein; and said statute further impairs the obligation of the contract existing among the parties to this action arising from the fact that the said parties all claim title under said Peter Poillon through conveyances which recognize and establish the property rights of the plaintiff in error as aforesaid.

VIII. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under said statute and under chapter 339 of the Laws of the State of New York, of the year 1892, whereby the easements and rights of the property of the plaintiff in error aforesaid were taken and appropriated by defendants in error and thereby he was deprived of said property rights and easements without compensation, for the reason that said authority was repugnant to section 10 article I of the Constitution of the United States, in the respect that it impairs the obligation of said contracts in last assignment referred to.

125 IX. That the said court of appeals of the State of New York erred in holding and deciding that the defendants in error were and are under no liability to compensate the plaintiff in error for the damages and injury inflicted upon his said premises by reason of either the erection, maintenance and operation of said viaduct

structure or the operation of trains in front of plaintiff's premises and in holding and deciding that said defendants were and are protected from such liability by the authority of a statute of said State, namely, chapter 339 of the Laws of 1892 thereof, such decision being repugnant to the Constitution of the United States and to section 10 of article I and to section I of article XIV thereof.

Wherefore, the said Patrick Kierns, plaintiff in error, prays that the said judgment of the said court of appeals of the State of New York be reversed, annulled and altogether held for nothing and that he may be restored to all things which he has lost by occasion of the said judgment, etc., and that he may have such other and further relief, according to law, as to the court may seem just and proper.

HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Attorneys and of Counsel for Plaintiff in Error,
43 Cedar Street, New York.

125½ [Endorsed:] In the Supreme Court of the United States. Patrick Kierns, as executor &c., plaintiff in error, against The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants in error. Orig. Assignment of errors. Rec'd N. Y. supreme court Feb. 1 1904 Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within assignment of errors is hereby admitted this 30th day of January, 1904. (Over) —— ——, attorney and solicitor for defendants in error The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company. Rec'd copy Jan'y 30, '04. Ira A. Place, att'y for def't R. R. Cos.

126 In the Supreme Court of the United States.

PATRICK KIERNS, as Executor and Trustee under the Will of John Kierns, Deceased, Plaintiff in Error, Representing Original Plaintiff,

against

THE NEW YORK & HARLEM RAILROAD COMPANY and The New York Central & Hudson River Railroad Company, Defendants in Error & Original Defendants.

} Petition for Writ of Error.

To the Supreme Court of the United States:

The petition of Patrick Kierns respectfully shows:

That your petitioner is a resident and citizen of the city and State of New York, and is executor of and trustee under the will of John Kierns, late of the county of New York, deceased; that said John

Kierns died on or about November 1, 1901, leaving a will which was duly admitted to probate in said county on November 21, 1901, and under and by which your petitioner was appointed executor of said will, and that in and by the terms thereof, the property hereinafter mentioned was devised to your petitioner in trust, for the uses and purposes therein mentioned. That the said deceased, John Kierns, was at all the times hereinafter mentioned prior to his said death, the owner — certain valuable land and premises situated in the borough of Manhattan, city, county and State of New York, and abutting upon Park avenue, a public street in said borough and
127 city, was at the times hereinafter mentioned, the owner of certain easements in said avenue of light, air, access, etc.; that prior to the commencement of the above entitled original suit or action the defendants therein, the defendants in error above named, The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, had been for a long time maintaining and operating an elevated railroad in said street or avenue in front of said testator's said premises.

That on or about September 14, 1897, said testator commenced said action against said defendants in the supreme court of the State of New York to recover the damages sustained by him by the said maintenance and operation, whereby said testator claimed that the said easements had been taken and impaired by said defendants unlawfully and without due compensation, and to recover an injunction against the further maintenance and operation of said elevated railroad, as appeared by the complaint of said testator in said action. Said defendants appeared and as a defense to the complaint in said suit or action, interposed an answer setting up in substance the provisions of certain acts of the legislature of the State of New York, namely, chapter 339 of the Laws of 1892, and amendments thereof, as command and authority to defendants to maintain and operate said elevated railroad.

That under the practice in said New York supreme court, no further pleading and no reply to said defense was allowed or required.

128 That said action came to trial thereafter in said supreme court at a special term thereof on the 5th day of November, 1900, before the Hon. Abraham R. Lawrence, justice, and thereupon and on January 14, 1901, the trial court overruled said defense and held the same to be invalid, and gave judgment in favor of the plaintiff for an injunction and for $1639.32 damages, and for other relief.

That upon appeal duly taken by both parties to the appellate division of the supreme court for the first department, the said judgment was duly affirmed and judgment of affirmance thereof entered on May 7, 1901.

That from said judgment of affirmance both parties thereupon appealed to the court of appeals of the State of New York, the same being the highest court of said State in which a decision in the suit could be had. Whereupon the said court of appeals on

February 24, 1903, made a final judgment or decree in said suit or action, directing that the said judgment of the appellate division of the supreme court so appealed from be reversed and plaintiff's complaint be dismissed, and that the record be remitted to the supreme court of the State of New York to be enforced according to law; that said record was thereupon so remitted accordingly, and thereafter and on March 31, 1903, final judgment was entered in and by said supreme court in obedience to the judgment of the court of appeals and according to the law and practice of the State of New York, whereby it was adjudged that said judgment of the court of appeals be made the judgment of the supreme court, and that the judgment previously rendered in favor of said testator by said supreme court be reversed and said testator's complaint be dismissed as aforesaid.

129 That in said court of appeals there was drawn in question the validity of the said statutes of the State of New York and the authority exercised thereunder by defendants on the ground of their being repugnant to the Constitution of the United States and the decision was in favor ofthe validity of said statutes and the authority exercised thereunder; that in said court of appeals it was claimed on behalf of said testator that the said acts of the legislature directing the taking of private property without due process of law and therein offended against the provision of the fourteenth amendment of the Constitution of the United States, and that they contravened the provisions of the Constitution of the United States, which forbid the impairing of the obligation of a contract, namely, section 10 of article I, of said Constitution.

That thereupon said court of appeals in said suit or action and in its decision therein, overruled the said claims of said testator and decided in favor of the validity of said statute and the authority exercised thereunder.

That notwithstanding the death of said testator John Kierns, pending the said appeals, there was no substitution of parties, and the proceedings were carried on in his name, as aforesaid.

Wherefore your petitioner prays for a writ of error directed to the supreme court of the State of New York, commanding that court to send a record of the proceedings in the said suit or action aforesaid, and all things concerning the same, to the justices of the

130 Supreme Court of the United States and for the usual citations and supersedeas to the end that the record of the proceedings being inspected the said justices of the Supreme Court of the United States may cause further to be done therein to correct all errors what of right and according to law and the law and Constitution of the United States ought to be done.

And your petitioner will ever pray.

PATRICK KEIRNS.
HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Attorneys and of Counsel for Plaintiff in Error,
43 Cedar Street, New York City.

STATE OF NEW YORK,
County of Suffolk, Eastern District } ss:
of New York,

Patrick Kierns, being duly sworn, says:
That he is the plaintiff in error herein; that the foregoing petition is true to the best of his knowledge, information and belief.

PATRICK KEIRNS.

Sworn to before me this 11th day of December, 1903.

S. B. GRIFFEN,
Notary Public, Suffolk Co., N. Y.

Allowed this 7th day of January, 1904.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of
the State of New York.

131 Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, possessors of the return and record in the action in which John Kierns is plaintiff and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company are defendants, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the court of appeals in the State of New York, wherein final judgment upon return from the supreme court of the State of New York was rendered February 24, 1903, that being the highest court of law and equity of the said State in which a decision could be had in the suit or action between John Kierns, plaintiff, and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants, and which has been remitted to said supreme court for execution and is now before you or some of you in said court; wherein was drawn in question the validity of the statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, a manifest error hath happened to the damage of the said John Kierns, and of his estate, and of his executor and trustee Patrick Kierns, as by complainant's complaint appears; we
132 being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties

aforesaid in this behalf, do command you, if a judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of January, in the year of our Lord one thousand nine hundred and four.

Allowed by

ALTON B. PARKER,
Chief Judge of the Court of Appeals of
the State of New York.

132½ [Endorsed:] In the Supreme Court of the United States. Patrick Kierns, as executor, plaintiff in error, representing original plaintiff, against New York & Harlem Railroad Company & The New York Central & Hudson River Railroad Company, defendants in error & original defendants. Orig. petition and writ of error. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Rec'd N. Y. supreme court Feb. 1, 1904. Service of a copy of the within petition and writ of error is hereby admitted this 30th day of January, 1904 (Over) ——— ———, attorney and solicitor for defendants in error. The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company Rec'd copy Jan'y 30/04 Ira A. Place att'y for def't R. R. Cos.

133 Citation.

UNITED STATES OF AMERICA, *ss:*

To the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York for the county of New York, wherein Patrick Kierns is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this seventh day of January in the year one thousand nine hundred and four.

ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York.

133½ [Endorsed:] In the Supreme Court of the United States. Patrick Kierns, as executor, plaintiff in error, representing original plaintiff, against New York & Harlem Railroad Company & The New York Central & Hudson River Railroad Company, defendants in error & original defendants. Orig. citation. Rec'd N. Y. supreme court Feb. 1, 1904. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within citation is hereby admitted this 30th day of January 1904 (Over) Rec'd copy Jan'y 30/04. Ira A. Place, att'y for def't R. R. Co's, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

134 Know all men by these presents: That we, Patrick Kierns, of the county of Suffolk, and State of New York, as principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company, both corporations organized under the laws of the State of New York, in the full and just sum of five hundred dollars ($500.00), to be paid to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, their certain attorney, successors or assigns; to which payment well and truly to be made, the said Patrick Kierns binds himself, his heirs, executors and administrators, and the said The United States Fidelity and Guaranty Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 18th day of December, in the year of our Lord, one thousand nine hundred and three.

Whereas, lately at a plea in the court of appeals of the State of New York, held at Albany, New York, on February 24, 1903, in a suit depending in the supreme court of the State of New York, between John Kierns, original plaintiff, and The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, a judgment upon return from said supreme court was rendered against the said John Kierns and

135 in favor of the said New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, dismissing his complaint without costs, and the said Patrick Kierns having obtained a writ of error, and filed a copy

thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Patrick Kierns shall prosecute said writ of error to effect, and answer all costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

PATRICK KIERNS,
By ATWATER & CRUIKSHANK, His Att'ys.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, Manager.

{Seal of the United States Fidelity & Guaranty Company. Incorporated 1896.}

Attest:
GEORGE E. HAYES,
Attorney-in-fact.

Sealed and delivered in the presence of
F. B. WOOD.

136 STATE OF NEW YORK, }
County of New York, } ss:

On this 28th day of December, 1903, personally appeared before me Alfred B. Cruikshank, one of the firm of Atwater and Cruikshank, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

[Seal of Fred. Koch, Notary Public, New York County.]

FRED. KOCH,
Notary Public, New York County.

STATE OF NEW YORK, }
County of New York, } ss:

On the 18 day of Dec., in the year 1903, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was manager of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation,

and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the year 1893. And the said Sylvester J. O'Sullivan, further said that he was acquainted with George E. Hayes, and knew him to be the attorney-in-fact of said company; that the signature of said George E. Hayes, subscribed to the within instrument, is in the genuine handwriting of said George E. Hayes, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Sylvester J. O'Sullivan.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York City.

STATE OF NEW YORK, }
County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify, that Alonzo G. Oakley whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a commissioner of deeds in and for the city of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such commissioner, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court and county, the 19th day of Dec. 1903.

[Seal of New York.]

THOS. L. HAMILTON, Clerk.

At a regular meeting of the board of directors of the United States Fidelity and Guaranty Company, duly called and held on the ninth day of November, A. D., 1903, at the office of the company, in the city of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved, That Andrew Freedman, vice-president, or Sylvester J. O'Sullivan, manager, or Leonidas Dennis, or Charles W. Young, or George E. Hayes, or W. C. Schuyver, or Gilman Ashburner, or H. C. Nash, attorneys-in-fact of this company in the State of New York, be and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or pro-

ceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

STATE OF NEW YORK, }
County of New York, } ss:

I, George E. Hayes, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said resolution.

Given under my hand and the seal of the company, at the city of New York, this 18 day of Dec. 1903.

GEORGE E. HAYES,
Attorney-in-fact.

Statement of the United States Fidelity and Guaranty Company, Rendered to the Department of Justice, Washington, D. C., at the Close of Business, September 30, 1903.

Assets.

Investments, stocks and bonds (market value)	$1,933,501.56
Cash on hand and in banks	117,033.44
Collateral loans	159,935.00
Real estate	264,929.67
Loans on mortgage	41,925.00
Mortgages and other collateral sc. salvage	4,000.00
Agents' balances, fidelity and surety, less commissions	228,913.30
Agents' balances, burglary, less commissions	50,136.91
Due for subscriptions, department of guaranteed attorneys	33,300.05
Advanced sc. contracts, secured	399,395.26
Interest due and accrued	17,756.31
	$3,249,915.50

Liabilities.

Capital stock paid in cash	$1,000,000.00
Cash collateral deposits	96,749.64
Surplus and reserve	1,457,165.86
	$3,249,915.50

STATE OF NEW YORK, }
County of New York, } ss:

George E. Hayes, being duly sworn, says that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said company, as of September 30th, 1903, and that the financial condition of said company is as favorable now as it was when such statement was made.

GEORGE E. HAYES.

Subscribed and sworn to before me this 18 day of Dec. 1903.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York City.

136½ [Endorsed:] Patrick Kierns and the United States Fidelity and Guaranty Company to the New York and Harlem Rail-

road Company and the New York Central and Hudson River Railroad Company. Penalty $500.00. Dated, December 18, 1903. Approved Jan'y 7 1904 Alton B. Parker Ch. J. Rec'd copy Jan'y 30/04. Ira A. Place att'y for def't R. R. Co's. Atwater & Cruikshank, attorneys at law, 48 Cedar street, New York city. Rec'd N. Y. supreme court Feb. 1 1904 Service of a copy of the within undertaking is hereby admitted this 30th day of January 1904. —— —— attorney and solicitor for defendants in error The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

137 UNITED STATES OF AMERICA:

Supreme Court.

STATE OF NEW YORK, }
County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York and of the supreme court in said county, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the foregoing pages, ending with No. 119, contain a true and complete transcript of the record and proceedings had in said supreme court and in the court of appeals of the State of New York in the cause of Patrick Kierns, plaintiff in error, representing John Kierns original plaintiff below, against The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error and defendants below, as the same remain of record and on file in said office and that the same, together with the annexed original petition for said writ of error, the assignment of errors, the original citation to the defendants in error and undertaking to prosecute said writ of error and copy of the opinion of said court of appeals, all of which were filed in the office of said clerk on the 1st day of February, 1904, and constitute the return to said writ of error.

M. J. D.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 2nd day of February, A. D. 1904.

[Seal of New York.]

THOS. L. HAMILTON,
Clerk of the Supreme Court in the County of New York.

[Endorsed:] In the Supreme Court of the United States. —— —— against The New York & Harlem Railroad Company & ano., defendants in error. County clerk's certificate.

Endorsed on cover: File No. 19,260. New York supreme court. Term No. 203. Patrick Kierns, executor and trustee of John Kierns, deceased, plaintiff in error, *vs.* The New York and Harlem Railroad Company & The New York Central & Hudson River Railroad Company. Filed March 3rd, 1904. File No. 19,260.